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SUMMARY OF MEETING

COMMITTEE ON LEGAL SERVICES

January 9, 2006

The Committee on Legal Services met on Monday, January 9, 2006, at 2:03 p.m. in HCR 0112. The following members were present:

Senator Grossman, Chair
Senator Dyer
Senator Groff
Senator Mitchell
Senator Veiga
Representative Carroll T.
Representative Hefley
Representative King
Representative Marshall
Representative McGihon, Vice-chair

Senator Grossman called the meeting to order. He said there are a couple of changes on the agenda as it was posted for the order of rules for consideration. We're going to take item 1b first, the rules of the Colorado state personnel board, department of personnel. After that will be the lottery commission rules, and then we'll proceed in order. One of the rules is no longer being contested and that is item 1d on the agenda, the rules of the director of the division of workers' compensation.

Dan Cartin, Deputy Director, Office of Legislative Legal Services, addressed agenda item 1b - Rules of the Colorado State Personnel Board, Department of Personnel, concerning personnel board rules, 4 CCR 801, and rules of the Executive Director, Department of Personnel, concerning personnel director's administrative procedures, 4 CCR 801.

Mr. Cartin said before he gets to the rule and the administrative procedures, he wants to take care of one housekeeping item. There are six separate rules here and I was wondering what the Committee's pleasure would be as far as my going through to the end of my presentation and the Committee voting at the end, or if it would be the Committee's preference to vote on each issue at the completion of my presentation on each of those. Senator Grossman said I'll permit the Committee to ask questions after each discrete rule presentation and then we will vote on the rules at the end of Mr. Cartin's presentation.

Mr. Cartin said initially he wants to mention three informational items for the Committee. First, all the personnel board rules and personnel director's administrative procedures were repromulgated and submitted to our Office last May. We review all the rules and procedures, including those that were unchanged from a preceding rule. As far as the difference between a board rule and director's procedure goes, section 14 of article XII of the constitution gives the personnel board the authority to make rules to implement the civil service amendment to the constitution and specifies certain subject areas of that rule-making. This section also gives the personnel director responsibility for administering the personnel system. State statute specifically grants the personnel director authority to issue administrative procedures and directives in accordance with the "State Administrative Procedure Act" (APA). The personnel director's authority to issue administrative procedures and directives was upheld in the 1984 Colorado supreme court decision of *Colorado Association of Public Employees v. Lamm*, 677 P.2d 1350 (Colo. 1984). In short, the board makes rules and the director issues administrative procedures, and both have historically done so through the state APA rule-making process. Secondly, administrative procedure 4-24., which relates to filling vacancies and positions in the personnel system, is the subject of two employee disputes in which administrative law judge (ALJ) opinions have been rendered. Those decisions, it is our understanding, may be reviewed by the personnel board. The fact that those administrative proceedings are pending does not impact the Office's review of this particular procedure or prevent the Committee from taking any action on this particular procedure. Finally, House Concurrent Resolution 04-1005, which Representative Marshall was the sponsor of, made a variety of amendments to the civil service amendment and was submitted to the electors at the 2004 general election as Referendum A. House Bill 04-1373, which Representative Marshall also sponsored, was companion legislation to Referendum A and made extensive changes to the state personnel law that were to be effective upon the passage of Referendum A. Referendum A did not pass and much of House Bill1373 did not become effective as a result. Where an administrative procedure discussed in the Office memo contains language that is similar to language found in either of

those measures, that similarity has been pointed out in a footnote for informational purposes.

Mr. Cartin said the first issue before the Committee arises from administrative procedure 2-11. A. and relates to the required review of the personnel director of positions nominated to the senior executive service (SES). Section 24-50-101 (5) (c), C.R.S., outlines the requirements for the SES. It states, in part, that the state personnel director shall establish criteria for inclusion in the SES and shall review each nominated position before it is placed in the pay plan for the SES. Administrative procedure 2-11. A. specifies the director's involvement in the appointment process for the SES, and says that the director, upon the request of a department head or to ensure the statewide total number of SES positions does not exceed 125, shall review any position to determine whether it should be included in the SES. Thus, administrative procedure 2-11. A. makes the director's review of the SES position contingent upon the request of the department head or to ensure the authorized number of positions is not exceeded. However, the statute requires that the director review each nominated position without exception or contingency. By requiring the director's review of nominated SES positions in only two narrow circumstances, administrative procedure 2-11. A. conflicts with section 24-50-104 (5)(c), C.R.S., and should not be extended.

Mr. Cartin said the next issue arises from administrative procedure 4-24., which relates to the referral of persons to fill a job vacancy or multiple job vacancies, and specifically relates to the constitution's "rule of 3". Section 13 (5) of article XII of the state constituion states that the person to be appointed to any position under the personnel system shall be one of the three persons ranking highest on the eligible list for such position, or such lesser number as qualify, as determined from competitive tests of competence, subject to limitations set forth in rules of the personnel board applicable to multiple appointments from any such list. Section 24-50-112.5 (2) (b), C.R.S., codifies this "rule of 3". Before I talk about administrative procedure 4-24., it may help the Committee to explain how the procedure that preceded 4-24. worked. Under that procedure, three referrals were made for the first vacancy in a position and one additional referral was made for each additional position. For example, if you had one vacancy, there would be applicants for that vacant position, they would all take tests, the applicants would be ranked by test score, and the three top-ranked test scores would be referred to fill that one vacancy. If there are multiple vacancies, again, the tests would be taken by the applicants, the applicants ranked, and then three for the first vacancy and one additional person for each vacancy would be referred, based on how they rank. For example, if you have five vacancies and you get 20 applicants,

the applicants would be ranked on the basis of their test scores, one through 20. Since there were five vacancies under the old rule, you would refer three for the first and one each for the next four, for a total of seven top-ranked test-takers. You fill the first four positions and when you got to the fifth position, you'd be filling from the remaining three candidates, because if you had seven candidates and you filled four, you have three left, and the final vacancy is still from among the last three. This rule ensured that of the top three ranked candidates, one of those was appointed, consistent with section 13 (5) of article XII and the statute. This process was approved by the Colorado court of appeals in the 1977 decision of *Haines v. Colorado State Personnel Board*, 566 P.2d 1088. Administrative procedure 4-24. changes the referral and selection process for filling vacancies. Administrative procedure 4-24. now provides for up to three referrals for *each* vacancy to be filled to be referred to the appointing authority. It also says that the person appointed shall be any of the persons referred, regardless of rank on the appropriate eligible list. For example, with our five vacancy, 20 applicant example, under the new rule, the 20 applicants take the test, they're ranked, and since you can now fill up to three for each position, you can refer 15 to fill the five vacancies, instead of the seven under the old rule. Under the new rule, after the first four positions are filled, by the time the appointing authority fills the fifth position, they're choosing from among 11, not three. Under administrative procedure 4-24., when the appointing authority fills the fifth vacancy, they may choose from a list of the 11 remaining highest ranked persons, instead of the remaining three highest ranked, as mandated by the civil service amendment and the statute. Under administrative procedure 4-24., as contrasted with its predecessor, which was approved in the *Haines* case, the appointing authority is not required to appoint and is expressly authorized to appoint someone other than one of the three highest ranking candidates to fill a vacant position. Therefore, the language of administrative procedure 4-24., authorizing the appointment of persons to a position regardless of rank and the appropriate eligible list, conflicts directly with the language of section 13 (5) of article XII and section 24-50-112.5 (2)(b), C.R.S., which requires that the person appointed to a position shall be one of the three persons ranking highest on the eligible list for the position. Administrative procedure 4-24. is the subject of two ongoing administrative proceedings. The ALJ has opined in both of those proceedings, and I believe this particular passage is relevant to this particular rule. The ALJ opined in the *Redden v. Department of Labor and Employment* (State Personnel Board Case No. 2005G094) case that the strict limitation that the "rule of 3" creates on an appointing authority's hiring discretion is completely intentional. The state personnel system is designed to force the question of qualification to be resolved on the basis of competitive tests of competence, rather than on the

more subjective opinions of appointing authorities on who is best qualified in a group of applicants. Pursuant to the constitution, no entity or individual has the ability to correct the "rule of 3". Only the voters of the state can change this limitation, and they have not done so. Because of this conflict with section 13 (5) of article XII and section 24-50-112.5 (2)(b), C.R.S., administrative procedure 4-24. should not be extended.

Representative McGihon said this question may be better asked of the department, but is there a reason that the "rule of 3" calculation was changed for vacancies? Mr. Cartin said during the course of talking to the department on the adminstrative procedures, we did get into that a little bit. I could probably speak to that, but it may be better to hear from the department so that I don't misstate the basis for the change.

Representative Marshall said this is probably a question for the department too, but were appointments made under this rule? Mr. Cartin said he's fairly certain that appointments have been made because there are at least two ALJ, ongoing employee disputes over the employee process under this new rule. As I read the ALJ opinion, this particular rule and the appointment process under the rule have been challenged by employees.

Mr. Cartin said the third issue arises from administrative procedure 4-31. B., relating to the constitutional and statutory six-month limitation on temporary employment. Section 13 (9) of article XII states that the state personnel director may authorize the temporary employment of persons, not to exceed six months, during which time an eligible list shall be provided for permanent positions. No other temporary or emergency employment shall be permitted under the personnel system. Section 24-50-114 (1) and (2), C.R.S., codifies the six-month temporary employment limitation for permanent positions and for emergency and seasonal positions. Subsection (1) provides that pending the availability of an eligible list, the appointing authority may fill a vacancy for a permanent position by temporary appointment of a qualified, certified employee and that such temporary appointments shall not exceed six months in length. Subsection (2) allows the state personnel director to authorize, by rule, the employment of persons from outside the state personnel system on a temporary basis while an eligible list is being provided or in emergency or seasonable situations nonpermanent in nature, but in each case the period of employment shall not exceed six months except for certain personal services contracts. Preliminarily, in *Colorado Association of Public Employees v. Lamm*, the Colorado supreme court said that the term "six months" is clear and definite on its face and that the statute was unconstitutional to the extent that it purports to authorize temporary appointments for periods longer than six

calendar months. Also, administrative procedure 4-31. B.'s predecessor provides that no person shall work as a temporary employee longer than six months in a 12-month period. Administrative procedure 4-31. B. now provides that when the services are non-permanent, such as short-term or urgent, no permanent position or eligible list need be established. The same person may fill a succession of such temporary positions provided no one position exceeds the six-month limitation and the positions are in different departments. Administrative procedure 4-31. B., has two infirmities. First, the procedure permits temporary employment of persons, without establishing a permanent position or eligible list, when the services are "short-term or urgent". However, section 24-50-114 (2), C.R.S., authorizes temporary employment in "emergency or seasonable situations". "Short-term or urgent" is not interchangeable with "emergency or seasonable". The director is without authority to modify by rule the statutory circumstances under which temporary employment for nonpermanent services is permitted. Secondly, administrative procedure 4-31. B. allows a succession of temporary employments by one person in excess of six months in a 12-month period. This conflicts with both the plain meaning of section 13 (9) of article XII and section 24-50-114, C.R.S., as well as the holding in *C.A.P.E. v. Lamm*. Because administrative procedure 4-31. B. authorizes a person to be temporarily employed for longer than six months in a 12-month period, as well as under a short-term or urgent circumstance rather than emergency or seasonal, it conflicts with the relevant constitutional and statutory provisions and should not be extended.

Mr. Cartin said the next issue is the personnel board rule 8-25. B., which relates to whistleblower claims. It's my understanding that the board is not contesting this rule. Section 24-50.5-104, C.R.S., sets forth the complaint and hearing process when an employee alleges that a disciplinary action is in retaliation for the employee's disclosure of information related to, generally, misconduct in a state agency. This section states that within 50 days after the date the complaint was filed with the state board, the board shall cause an investigation of the charges to be made by the state personnel director. The state personnel director shall complete the investigation within 45 days after the commencement thereof. Rule 8-25. B. elaborates on the complaint and investigation process and states that the complaint and response will be referred to the director for investigation. A written report will be provided to the board within 45 days of receipt. The board, upon a showing of good cause, may extend this time. Section 24-50.5-104 (1), C.R.S., does not authorize an extension of time beyond the 45-day period to complete the investigation as the rule permits. Presumably, had the General Assembly intended to allow an extension of time for delivery of the investigatory report,

it would have specifically authorized that extension as it did for the hearing described in the statute. Since rule 8-25. B. authorizes such an extension of time, it conflicts with section 24-50.5-104 (1), C.R.S., and should not be extended.

Mr. Cartin said the last two rules relate to personal services contracts. Administrative procedure 10-3. F. authorizes the abolishment of positions in the state personnel system as a result of a personal services contract, so long as no employee suffers a loss in pay status or tenure. Section 13 (8) of article XII states persons in the personnel system of the state shall hold their respective positions during efficient service or until reaching retirement age, as provided by law. This provision has been construed in several decisions relating to the privatization of state services. The 1991 decision of the *Colorado Ass'n of Pub. Emp. v. Dept. of Highways*, 809 P.2d 988 (Colo. 1991) contains two relevant principles in relation to this rule: (1) Personal services contracts cannot be used to obtain services when those services have been commonly and historically performed by classified state employees, there is a continuing need for those services, and proper classified positions currently exist; and (2) Because privatization so directly implicates both the personnel system as a whole and the specific protections accorded state personnel system employees under section 13 (8) of article XII, standards regulating privatization must be established by legislation, regulation, or a combination of the two. In 1992, Judge Bayless of the Denver district court held in *Colo. Ass'n of Pub. Emp. v. The Colorado Department of Personnel,* (Denver Dist. Ct., No. 90 CV 1172, 1992) that an expansion of independent contractor personal service contracts has a direct and adverse effect upon the state civil service system by reducing the number of positions available to state employees, and that a department of personnel procedure permitting the proliferation of such contracts is inconsistent with the civil service amendment. As a result of those decisions, the General Assembly in 1993 enacted sections 24-50-503 and 24-50-504, C.R.S., on personal services contracts. Section 24-50-503, C.R.S., specifies the conditions that must be met in order for the state to enter into a personal services contract that implicates the state personnel system and prohibits the state personnel director from approving a personal services contract if the contract would result directly or indirectly in the separation of certified employees from state service. Administrative procedure 10-3. F. provides that positions in the state personnel system may be abolished and employees transferred or reassigned as a result of a personal services contract if no certified employee suffers a loss in pay, status, or tenure. Initially, the authorization in administrative procedure 10-3. F. to abolish positions in the state personnel system as a result of a personal services contract appears to conflict with the line of cases that

prohibit personal services contracts for services that have been historically performed by state employees or that have a direct and adverse effect on the personnel system by reducing the number of positions available to state employees. Specifically, the procedure authorizes personal services contracts for services that have been commonly and historically performed by classified state employees, in contravention of the *Highways* case. It authorizes a reduction in the number of positions available to state employees through personal services contracts and thereby perceivably permits a proliferation of personal services contracts in contravention of the *C.A.P.E. v. Department of Personnel* decision. Secondly, this blanket authorization for the privatization of classified positions is not specifically authorized by the personal services contracts provisions of statute that were crafted by the General Assembly in 1993. Additionally, administrative procedure 10-3. F. conflicts directly with section 24-50-503 (2), C.R.S., since it authorizes personal services contracts that will result directly, or indirectly, in the separation of certified employees from state service by permitting the elimination of positions that could otherwise be filled by state employees. Practically, it is difficult to see how the abolishment of classified positions and the probationary employment bumping rights that are triggered by a transfer or reasignment of affected employees will not directly or indirectly result in separation of classified employees from state employment in contravention of the civil service amendment and section 24-50-503 (2), C.R.S. Finally, regardless of the constitutional issues surrounding administrative procedure 10-3. F., such a significant policy change is arguably one for the General Assembly and authorization by statute, similar to 2004, when language substantively identical to this procedure was contained in House Bill 1373. Also, one argument posited by the department in support of administrative procedure 10-3. F. is that the focus of the limitation and the restriction of personal services contracts in privatization is on the employee and not on the position. So long as the employee maintains his or her job and has no adverse impact on pay, status, or tenure, the argument goes, the position can be abolished and the employee reassigned. However, we don't read the constitution, statutes, or any judicial opinion to expressly or impliedly authorize the abolishment of classified positions by personal services contracts so long as the pay, status, and tenure are not impacted in the absence of an amendment to the constitution. Given the relevant judicial decisions and the statutes governing personal services contracts, administrative procedure 10-3. F. conflicts with those cases, statutes, and the constitution. Since administrative procedure 10-3. F. conflicts with section 13 (8) of article XII, the relevant case law construing that provision, and section 24-50-503 (2), C.R.S., it should not be extended.

Representative McGihon said she presumed Mr. Cartin had the capacity to see the department's arguments before today. Is that right? Mr. Cartin said if Representative McGihon is talking about the memo from the department, I did not have a chance to look at that. However, we did talk to the department like we always do.

Representative McGihon said in the memo on administrative procedure 10-3. F., the department distinguishes the *Highways* case, saying that it was misread because it did not hold that functions "commonly or historically" performed by state employees could not be contracted out. Instead, that language was drawn from a statute that no longer exists, section 24-50-128 (3), C.R.S. Moreover, that section was repealed in 1993 by the same bill that established the current part 5 of article 50 of title 24, C.R.S., that authorizes state contracting. Could you respond to that? I heard you talking about the *Highways* case and I heard you say that the legislature brought the new part 5 in response to the *Highways* case, not in contradiction to it, and that there were some other holdings in the *Highways* case that had to do with positions, not simply just functions. Mr. Cartin said this is the first time he's heard that the *Highways* case did not hold that functions commonly or historically held by state employees could not be contracted out. That's the first time I've seen that argument made. I think in our experience, both in providing advice and drafting statutes and other rule issues that have come to this Committee, we've relied on the *Highways* case for that proposition. I guess my response is I have to look at this and think it through before I can comment on whether or not the argument in our eyes is viable. I have great respect for the department and the folks that interpret these rules and the statutes and constitution, but this is the first time I've seen this take on the *Highways* decision. I think to be responsive to the second part, I don't know if this is consistent with what the department said, but it was also my understanding that the enactment of part 5 of article 50 of title 24, C.R.S., and personal services contracts was in response to the *Highways* case and to the decision by Judge Bayless, commonly known as the Bayless decision in *C.A.P.E. v. Department of Personnel*.

Representative McGihon said she was startled by this different reading of *Highways* than the one in the Office's memo. In footnote 14 on page 12 of the Office memo, it seems to indicate a very different reading.

Senator Mitchell said he may have missed some of the context of one of the points Mr. Cartin made, and he's trying to consider its implications. One juncture in the last administrative procedure Mr. Cartin was explaining was something to the effect that positions could never be eliminated because, by

definition, if a position doesn't exist, it's not being filled by a state employee and if it does exist, it could have been filled by a state employee. Do you recall the passage I'm referring to? Could you tell me if that paraphrase is accurate? Mr. Cartin said the Office's argument is that administrative procedure 10-3. F. conflicts with the statute since it authorizes personal services contracts that will result directly or indirectly in the separation of certified employees from state service by permitting the elimination of positions that could otherwise be filled by a state employees.

Senator Mitchell asked if the objectional substance there is that any position that's eliminated might hypothetically otherwise be filled by a state employee? Doesn't that lead to the logical conclusion that the state can never eliminate, reduce, or streamline any classified positions? Mr. Cartin said that's a good question and here's what I think the difference is: The language of the administrative procedure appears to authorize the abolishment of positions and the transfer or assignment of persons in those positions to another position in the state personnel system. That is different from a situation where you have in an agency and three vacant positions and the positions have gone vacant because of retirement or moving to another position and the agency decides at that point in time to go ahead and streamline through attrition, perhaps even privatize those positions, where employees aren't directly impacted. I think there is a difference between those two situations and I think if the administrative procedure expressly authorizes the abolishment of positions that have performed services that are commonly and historically performed by state personnel employees, that's the difference between the situation where you've got an agency that reduces, streamlines, or eliminates positions through attrition. I think there is a difference there between those two situations.

Senator Mitchell said he's still trying to figure out where the injury is or what interest staff interpretation would serve to protect. Let me try to toss a couple hypotheticals your direction. If, for some other restructuring purpose, the state found it desirable to move employees from one function to another function, without loss of rank, pay, tenure, or status, could the state do that without eliminating positions? If the number of positions remains constant, can we move "worker A" from one kind of activity to another kind of activity? Mr. Cartin said he thinks in that situation where positions are not eliminated, then the *Highways* case and section 24-50-503, C.R.S., and the Bayless decision don't come into play.

Senator Mitchell said if an individual employee can be moved from A to B without injury to that employee's standing, why is there then injury if a

position gets eliminated? Who's being protected and who's being hurt if a postion is no longer filled because an employee that was transferred disappears? Mr. Cartin said because he thinks, right or wrong, our analysis focuses on the position and not on the employee.

Senator Mitchell said it sounds more about protecting bureaucratic structure than individual employees. Mr. Cartin said he would say that again, give the language of the constitution, the statute, and the cases, that's what we have to go on. That's the framework for our analysis and that's how we landed where we landed. Admittedly, it could be a close call.

Senator Mitchell asked if Mr. Cartin can set aside the very careful and accurate text of his memo and explain to me in street terms what constitutional and case language says that you can't move an employee if the position ceases to exist? Mr. Cartin said section 13 (8) of article XII speaks to employees retaining their positions during efficient service. You have the language from the two judicial decisions that I talked about that say positions can't be eliminated, notwithstanding the argument of the department.

Senator Mitchell asked if that is the possible source of the ambiguity, when the language says positions can't be eliminated? The department interprets that to mean the real live jobs of real live people and staff interprets that to mean whatever state slot currently exists? Mr. Cartin said very roughly, boiled down, that's the big picture.

Mr. Cartin said the last issue relates to the preceeding issue. The last issue arises from administrative procedure 10-5., which provides a notification review process for the personal services contracts that are contemplated under the rule we just talked about, administrative procedure 10-3. F. As previously discussed, administrative procedure 10-3. F. appears to conflict with section 13 (8) of article XII, the relevant case law, and section 24-50-503 (2), C.R.S. Administrative procedure 10-5. appears to be directly connected to administrative procedure 10-3. F., since it sets forth a notification and review process for departments considering eliminating permanent positions in connection with a personal services contract. Since administrative procedure 10-3. F. authorizes the abolishment of positions in connection with personal services contracts, conflicts with law, and exceeds the director's rule-making authority, the review and comment process that effectively implements that procedure for such contracts that is contained in administrative procedure 10-5. is inherently flawed with the same conflict and lack of authority. Therefore, administrative procedure 10-5. should not be extended.

Representative McGihon asked if the logic under administrative procedure 10-5. is the same logic you described on administrative procedure 10-3. F.? Mr. Cartin said that's right. The bottom line on this is that administrative procedure 10-3. F. authorizes the abolishment of positions for personal services contracts in certain situations. Administrative procedure 10-5. says if you're going to abolish the contracts, here's the notification and review process you go through. The argument is, if administrative procedure 10-3. F. fails, administrative procedure 10-5. fails also.

Kristin Rozansky, Director, State Personnel Board, testified before the Committee. She said as Mr. Cartin has pointed out, the board did repromulgate all of its rules last spring and in rule 8-25, the section that is being objected to by the Office has been in the rule for a while, but the board has no disagreement with the Office on striking that. In fact, we are noticing of a hearing next week that we will hold in March and we're going to strike that language from the rule and repromulgate it.

2:44 p.m.
Senator Grossman said the Committee would stand in a brief recess while we wait for a senator to return to the meeting

2:45 p.m.

The Committee returned from recess.

2:45 p.m.

Hearing no further discussion or testimony, Senator Groff moved that rule 8-25 of the State Personnel Board be extended and asked for a no vote. The motion failed on a 0-10 vote, with Senator Dyer, Senator Groff, Senator Grossman, Senator Mitchell, Senator Veiga, Representative Carroll, Representative Hefley, Representative King, Representative Marshall, and Representative McGihon voting no.

Paul Farley, Deputy Executive Director, Department of Personnel, testified before the Committee. He said as was referenced earlier, we did hand out a letter providing some written support of our position today. I will not be reading this to you. The idea was that this would help guide the discussion as we go along. He wants to let the Committee know that of the five rules at issue, we determined late last week on our own initiative we would repeal three of those, and we have done that. We can talk about those rules, but out of respect for the Committee's time, I've provided that discussion in the

written materials so we don't have to spend a lot of time talking about that unless the Committee would like to.

Mr. Farley said that rule 2-11. A. on the senior executive service was intended to stand on top of the statute, not to conflict with the statute. We don't think in our rule-making we need to adopt a rule that repeats the statute. Let me talk a little about how SES works, practically, with our department. I trust most members of the Committee are familiar with the SES and what it's about. Our process has always been that a department head must file a written nomination with the executive director of the department requesting that a particular position be considered for inclusion in the SES. That's our standard practice. It was our practice before this rule, it's been our practice under this rule, it will be our practice in the future. We agree with staff that the statute does require each and every position to be reviewed before it can be allocated or not allocated in the SES. We start that with the department head. If a department head doesn't ask us for a position to be in the SES, we don't unilaterally go in and do that. The second piece of what this rule was intended to do was to confirm our authority, which is not specific in the statute, that at any time if the system begins to bump up against the 125 positions maximum that the statute allows, we could unilaterally go in and review positions to see if any should be taken out. That was the intent of that administrative procedure.

Representative Carroll said Mr. Farley made the comment you're not sure how in statute that you don't have the ability or the authority or how it's unclear that the director can say when SES gets near the 125, they can put a cap on it to slow it down. I'm sitting here reading 24-50-104, C.R.S. and I'm not really sure what's unclear about the authority the director has in that regard. Mr. Farley said what we're saying is that the statute is certainly clear that the 125 may not be exceeded. What we're trying to confirm in the rule is that we may, on our own, if we're bumping up against the 125, reach into a department that hasn't asked us to rereview one that's already been approved as an SES to make sure that as a system we stay below 125.

Representative McGihon asked how can you say this rule, as you perceive it, complements the statute, when it only requires the director's review in two circumstances instead of in all circumstances? How is that a complement? Mr. Farley said I think we agree on the 125 and keeping it below the limit. Our process is that no position ever gets reviewed without a request. In other words, you can't get into the SES without that department head first filing a request with the department of personnel. There's no other way into it. It's a procedural provision.

Representative McGihon said her question really is, though, the rule doesn't require the review of all 125 positions. It only requires the review in two circumstances. You wrote in your memo that it complements the statute, so my question comes out of your memo. How does that complement the statute that requires review in all circumstances? Mr. Farley said the rule tries to make clear, and obviously from our discussion today was not altogether successful, that if the department head wants to have a position considered for the SES, they have to initiate it by request. That's not something we do unilaterally. The statute speaks for itself, that every position has to be reviewed, which is absolutely true. That review starts with the department head saying I have a position that I'd like to be put in the SES.

Representative McGihon said but what this rule requires is not what the statute requires. This rule only requires the review in the two circumstances. Your memo talks about it complementing the statute. I think your response answers my question in that I don't think it complements the statute, that it's different from the statute, and your process may be slightly different. Perhaps we need to go back to the drawing board and get a rule that does complement the statute and incorporate what your processes were when review occurs. Mr. Farley said I think we're reading it differently. I appreciate what you're saying. Again, our process is the same with or without this rule. We're going to demand every department head to file a request with us before any position gets put in and we're going to review each and every one before it gets put in.

Senator Mitchell said he's concerned to hear that the department is withdrawing its proposed rule 10-3. F. Based on the discussion I had with Mr. Cartin, that's the one I understand turns on what "maintain employee's position" means. Is the department's backing off of this rule in any way an acquiesence that "position" means a full-time slot regardless of whether or not there's a living, breathing person employed in that slot?

Senator Grossman said they hadn't gotten to 10-3.F. yet, but that's a good segway, so proceed.

Mr. Farley said no, it remains our view that there is a profound constitutional distinction between "persons" and "positions". In all deference to Mr. Cartin, this has been a point of some discussion in the personnel system for 15 years now. I invite members of the Committee, if they're inclined, to review the *Highways* decision and note that, in fact, the "common and historical" language is directly lifted from the statute that existed at the time, which was repealed by House Bill 93-1212. The reason I'm intimately familiar with that is I was in the attorney general's office at the time all this was occurring, and

I and a colleague were responsible for most of the language in House Bill 1212, because we as attorneys for the executive branch had to respond to the *Highways* case and Judge Bayless' decision the following year. The *Highways* case made the point that there needs to be legislative and regulatory guidance in order for there to be personal services contracting. There was not. The department adopted rules. Judge Bayless knocked the rules out saying you have no legislative authority for these rules. Therefore, we had a bit of a fire drill, on behalf of the then-president and speaker in the legislature, to draft a statute that would sustain the contracts that were then in place in the state. You'll notice that the contracting section, part 5 of article 50 of title 24, C.R.S., was effective on signature on April 7, because we were really scrambling to try and support what was going on. In the *Highways* case, there were specific state employees who were taken out of their jobs and put on the street and that's what actuated the supreme court's decision. The supreme court had to vindicate the property rights which classified state employees have in their jobs and properly so. At the same time, it said that before you're going to do anything that adjusts the shape and the size of the civil service system, the general assembly has a role to play. You can't have executive agencies just entering into personal services contracts that might have an impact on the scope of the civil service system without legislative authority. That's different than saying that with the statutory authority now in place, we cannot say we're going to eliminate positions X, Y, and Z, which are currently vacant, no state employee loses any property right and is not put on the street, and we're going to eliminate those positions, either through attrition or transfers to other vacant positions, and contract that out.

Senator Mitchell said he appreciates Mr. Farley's common sense explanation, but before I beg to take temporary leave of the Committee, I'll say that I think your analysis underscores that the personnel system is intended to protect living employees of the state, not a hypothetical number of state jobs. I appreciate your explanation of that principle.

Senator Grossman said if the discussion on 10-3. F. and 10-5. is done we need to go back to the multiple referrals rule.

Mr. Farley said multiple referrals is another one of those tricky little areas of the civil service system that the administration struggled with a little bit. I believe Representative McGihon asked about why. The very simple answer to that is that under the previous rule, it was the number of vacancies plus two. If you had one vacancy, you'd get three names referred. If you had two vacancies, you'd get four names, and so forth. That doesn't give you a lot of options, particularly if, in some of the larger departments, you may be hiring

five or 10 employees at a time. Under that old rule, if you're hiring 10 accountants, 10 correctional officers, or 10 whatever, you would get 12 names referred. That all but guarantees that everybody except two people are going to be hired. Mr. Cartin was correct: That was upheld by the state supreme court, but the supreme court's decision didn't say that's the only way you could write a rule that would comply with the constitution. We were trying to provide more options and we took the "rule of 3" at face value. If I have five vacancies, give me three names for each one, so give me 15. It gives the appointing authorities a lot more flexibility. The important thing to remember is that for half the century, we had a rule of one in this state. In 1970, the voters specifically amended that to a "rule of 3" because they felt that there's imperfections or shortcomings in any testing system no matter how elaborate you make it and that you needed to allow a little more discretion for appointing authorities. The state constitution provides the board can limit multiple vacancies by rule. The board has not done that. Under the old rule, if there are five vacancies, you get seven names. Where's the room for the board to do a rule lowering that number? I suppose they could lower it to six. If they lower it to five, they actually reduce it back to a rule of one, which I think is completely backwards of what the voters intended in 1970. Under our version of the rule, they get 15 names and the board can write a rule that reduces it to 12, or 10, or whatever number. One can argue about whether this is the best reading. It's certainly an acceptable reading and Judge Bayless, who is not typically sympathetic to some of our department's regulatory efforts, had a case where a group sued to throw this rule out, asked for an injunction, and in looking at the injunction request, Judge Bayless thought this was one of a range of available options for the department.

Representative McGihon said Mr. Farley wants to increase the board's flexibility, but what the voters passed in 1970 wasn't a rule of 15, it was a "rule of 3". We have a situation where we have 10 vacancies, you've got 15 or 20 people who took the test, they've applied for the job, and you've got the top 12 scorers. Right? That's who you choose. Mr. Farley said yes, that's right.

Representative McGihon said these are people you know want the job and have tested well. When you get to job number 10, you have the choice of three people. With vacancy number one, though, you have the choice of 12, and then 11, 10, 9, 8, and going down. It's not like there isn't some flexibility as you have the opportunity to select people. You have people who are interested in and tested well for the job, so I'm wondering why the director felt that he could amend the rule so that now you have the flexibility to choose between 15 people for five vacancies. Mr. Farley said quite simply, particularly as the

number gets larger, you're flexibility is greatly reduced. If you have a "rule of 3", essentially, you can discard 2/3 of the names. When you have 8 vacancies that you're filling, you can discard 20% of the names. The larger the number of multiple selections that you're doing, there's actually less flexibility on behalf of the appointing authority because he's got to hire 80% of the names in front of him instead of 1/3 of the names. I think this is a policy question and a legitimate one, but I'm not sure it's a legal question based upon what Judge Bayless thinks and the analysis we've provided.

Representative McGihon said but the constitution doesn't give you the flexibility to have 15 names for five vacancies. The constitution says to you, you have to hire 80% of the people, those folks who applied for and tested well on the job. Mr. Farley said with all due respect, the constitution doesn't say that. It says there is a "rule of 3", subject to limitations established by the board. The board has established no limitations. An appointing authority is entitled to, I think, three names for each vacancy. I understand your argument, but I don't understand what there is for the board to do if we take the view that the constitution compels a vacancy plus two rule.

Representative McGihon said as a policy question, I'm also wondering why the board or the director would not want to have the top 10 or 12 test-takers for one position and why the board would want to go down and take a look at the bottom 2/3 who didn't test as well. Mr. Farley said he would offer the same kinds of things that compelled the public in 1970 to go from a rule of one to "rule of 3". That is, in any testing system, no matter how elaborate or thorough you are, there's always a human element. In 1970, they recognized you cannot write any test that's going to guarantee that the very best person, in terms of temperment and everything else, is going to score highest on the test.

Representative McGihon asked if there is anything that didn't work with the rule other than your notion that it wasn't flexible enough, with the way the previous rule worked? Mr. Farley said again, if I'm an appointing authority and I'm hiring eight positions and I've interviewed that group of people, I think you might agree that in a group of 10 or 12 people, you might find a couple that you don't think are going to work. Now the appointing authority is pretty much compelled to hire everybody else. It's sort of the negative. We're not now hiring by merit and fitness, bit we're now hiring by what's the best we can come up with because we're not allowed to look at additional names.

Representative Marshall asked if those individuals who are bringing an appeal

to this issue should prevail, what happens to those individuals who've been appointed to these positions? Mr. Farley said there's a board rule that prohibits any employee from being certified while an appeal is pending or while there is a dispute about the position. Presumably, if the board rules in favor of the challenging employees, anyone who has been appointed under that rule would be terminated from state service.

Mr. Farley said administrative procedure 4-31. B. on temporary status is one that the department, on its own initiative, did withdraw last week. I'd be happy to discuss it as much or as little as the Committee would like. Let me say, generally, what we were trying to accomplish with that rule. There is a relationship between temporary employees, permanent part-time employees, and contract employees. Frequently, when there is a sporadic labor need for the state, a decision-maker has several different ways to go. We were trying to provide some guidance regarding that. In the memo is the battle of "dueling dictionaries" about what term means what. I'll leave that to the considered judgment of the Committee on that. What we were trying to do is flush out those circumstances, and this is admittedly very broad, when an appointing authority should look at a temporary employee versus a permanent part-time employee versus a contract employee. There is a relationship there. The temporary statute specifically makes a cross reference to the contracting statutes. We tried to tie those together. That's one reason we chose the word "urgent", because that's a term that's used over in the contracting section. On the *C.A.P.E. v. Lamm* case, regarding appointments for six months or 12 months, the only point I would make on that is that in that case, the attempt was to take a position and actually allow the person to work on that same job for 12 months by counting the hours and thereby saying, well they've only worked half-time for the scope of the year , therefore that really counts as full-time for six months. We agree with staff that the constitution is pretty clear: Six months is six months. Again, though, we think that applies to positions and not individuals. The reason that six-month limitation was put in the constitution in 1970 was because for decades prior to 1970, there had grown a situation in the state civil service where employees were being appointed temporarily for months or years at a time and voters wanted to cut that off. If you have a permanent ongoing labor need of the state, you need to be looking at a permanent employee and not filling it with these open-ended temporaries. We think that's a different situation then when you have a temporary in department "X" working as an administrative assistant, then they go to department of natural resources and work as a seasonal wildlife officer. It's different jobs, it's different departments, and neither one of those really implicates the state civil services system as a whole. That was the thinking there.

Representative McGihon said that's not exactly what's happened lately. I've heard of many circumstances where people's friends are going into temporary jobs throughout departments or in similar positions at different departments. The voters decided when they prohibited the temporary service for more than six months long ago that they didn't want that to go on either, didn't they? Mr. Farley said he doesn't know anything in the legislative history from the 1970 amendment that suggests that. I did spend quite a lot of time on that. I was director of the civil service commission a couple years ago and I spent more time going through all that then I care to remember. The "persons" vs. "positions" issue is a thing you see us coming back to and it is a hard one. I guess if I was to look at some of these rules again and ask would we do them over again, part of my thinking is that no good deed goes unpunished. What we've done here is try to be very upfront about what goes on in the system at ground level. We certainly welcome some legislative guidance or maybe authority on some of this stuff, because these problems are not going to go away. The problem with temporaries, part-times, and contracts is going to be with us until we fix it. I don't have anything else to say on temporaries unless there are any questions.

Mr. Farley said administrative procedure 10-3. F. is one we repealed last week, but I do want to encourage folks to look at the "commonly or historically" language. That has been something that has been bandied about in state government for 15 years. If you really look at the *Highways* case closely, they were picking up statutory language that doesn't exist anymore. That's why when we drafted House Bill 93-1212, that was one of the things that was repealed because we determined it was the wrong test. Whether something has been done by a state employee before doesn't tell you whether a state employee should continue to do it or if it should be contracted. It's not the right question to be asking to get the answer to make a good business decision. There are things that maybe state employees have never done before that they can do a better job of and there may be things that state employees have done for years but maybe technology gives us other alternatives. That's why that's an important distinction. I wanted to pick up a little bit on a point that Senator Mitchell made, which is an important one. There are two things going on here, and this is why this is a tricky little area. You have constitutional property rights vested in individual employees, and you can't be taking away those property rights and putting employees on the street to do contracts. We all agree on that. There is a larger question about the integrity of the civil service system. That's what they talked about in the *Highways* case. Part of what the *Highways* case said was the general assembly, first and foremost, needs to weigh in on how big and what the shape and size of the

civil service system ought to be, and then the personnel board and the personnel director have a role to adopt regulations on top of that. I don't think it's a hard and fast constitutional principle that you can never eliminate a vacant position. The general assembly adds positions and subtracts them every year during the long bill process. I don't think we want to start down that road. It's more troublesome if we're actually putting employees on the street. There's some ability there, with legislative guidance, which we think part 5 of article 50 of title 24, C.R.S., the contracting statutes, gives us to shape the size of the civil service, as long as we're not injuring individual employees.

Mr. Farley said administrative procedure 10-5. is another rule we withdrew. Again, we agree with staff that it's intermingled with the whole contracting analysis, but I'd like the Committee to understand why we had that rule. It was to provide additional protection for state employees, to make sure that instances of subterfuge could be flushed out because we certainly acknowledge that abuses can occur in the system and we wanted to make sure that, in this case, before a contract even eliminated vacant positions, those contracts would have a review process through our department. It is so that we could have a shot, before the contract is actually executed, to see if, indirectly, state employees are put on the street. We eliminate prostions here, we transfer here, then we eliminate funding over in these positions and these people get laid off but they say it's unrelated to the contract. This process was designed to flush that out, but we agree with staff that it's completely bound up with the previous rule 10-3. F., so we have repealed that as well.

Rich Djokic, Colorado Federation of Public Employees (CFPE), testified before the Committee. He said he has been engaged by CFPE to review certain of the director's administrative procedures with respect to the issues that have been raised by Mr. Cartin and staff before this Committee. Having listened to the previous testimony, there are three administrative procedures, according to Mr. Farley, that have been repealed or withdrawn. I would say that unless the Committee has questions of me on those particular three, I will not go into them specifically. The first rule I want to consider is an adjunct of the multiple vacancy rule. Again, we also, in our analysis, indicated that we have issues with rule 4-24., with respect to multiple vacancies, as being contrary to the constitution and to statute. We would concur with Mr. Cartin's analysis of that particular rule. Again, unless there are questions, I'll move along. The first administrative procedure we object to, that staff did not, was administrative procedure 4-14. and is contained in the memo that has been provided by the CFPE to the Committee. This has to do with the notion of discussing assessments of qualifications. Had the referendum on civil service

reform, Referendum A, passed, we wouldn't be here today. However, it did not, and we are. What we're noting are concepts that came out of Referendum A and House Bill 04-1373 that are in the director's administrative procedures that we believe are contrary to or modify statute or the constitution or are beyond the authority of the personnel director to promulgate and adopt. In the constitution, it indicates that persons come into, or are appointed to or promoted in, the system based on competitive tests of competence. That was proposed to be changed not only in the constitution in section 13 of article XII, through Referendum A, but also through House Bill 1373, to "comparative assessments of qualifications". It's our view that that concept is not provided in the constitution, as it exists today, or in the statutory framework. The other piece that shows in administrative procedure 4-14. is the concept of "job fit", which is also neither in the constitution nor in the statutory framework. Section 24-50-112.5 (1) (b), C.R.S., says appointments and promotions to positions shall be based on job-related knowledge, skills, abilities, competencies, behaviors, and quality of performance as demonstrated by fair and open competitive examinations. It does not appear that comparative assessments have been substituted for examinations in the statute. While there may be some semantic discussions that may occur in the area, we're concerned with the notion specifically of "job fit". In some of the human resource literature that I have reviewed, it is driven to an extent by these personality tests with which there could be incidents that could lead to profiling or to claims of discrimination. Based on a strict reading of the constitution and of statute, and for policy reasons, we would ask that administrative procedure 4-14 not be extended either.

Senator Grossman said 4-14. has not been recommended by staff to not be extended.

Mr. Djokic said again on administrative procedure 4-24. on multiple vacancies, he really doesn't have anything to add other than to say that generally the facts of the two cases that are before the personnel board tend to show, at least as the procedure is applied, how it becomes contrary to the constitution or the current statute. In those cases, there are 10 positions available, which beget 31 referrals. However, the executive director only chose to fill seven. The dispute comes that someone ranking lower than the 21st-ranked individual was appointed to one of the positions. Back to the discussion of ranking, with such a large pool, at least in these two particular cases, the facts would indicate how the procedure could be utilized, in our view, in contravention of the constitution and statute with respect to the "rule of 3".

Mr. Djokic said his last two comments are on chapter 10 of the director's administrative procedures on personal services contracting. There are two procedures that staff had not commented on either. Administrative procedure 10-1. seems to be a preamble to the personal services contracting piece. It begins by saying that the Colorado constitution does not specify the services that must be performed by state employees and offers no guidance concerning criteria or mechanisms for delineating, enlarging, or reducing the state personnel system. As Mr. Cartin indicated, in 1993, House Bill 1212 was passed to address the *Highways* case and the Bayless decision. That sentence I just read you comes directly out of the *Highways* case. It seems as though the general assembly has done so, and in looking at the preamble or at least the legislative intent in section 24-50-501, C.R.S., it is pretty clear that the legislature seeks to balance privatization with its impact on the state personnel system as a whole and the statutory scheme enacted thereafter in sections 24-50-503 and 24-50-504, C.R.S., do so with respect to contracts that impact the personnel system and those that don't. In our view, the preamble in administrative procedure 10-1. would appear to be contrary to what the general assembly did in 1993 and as the law exists today.

Mr. Djokic said the other provision is administrative procedure 10-3. E. This is an adjunct to the discussion on temporary employees and, in our view, dovetails with Mr. Cartin's analysis of administrative procedure 4-31. B. with respect to coat tailing a series of temporary employments that may exceed the six-month limit provided in the constitution and statute. This particular procedure says a department shall not use a succession of alternating temporary employment and personal services contracts in order to avoid either the timely creation or filling of permanent positions. It goes on to say a person may work as a state temporary employee six months and subsequently be retained as a contract worker in a different department. Is that not similar to the situation in administrative procedure 4-31. B. that staff has pointed out as having two infirmities of being able to utilize personal services contracts after a six-month temporary stint is exhausted and move to another department? Is there a preclusion after the contract expires for the temporary employee to come back to the initial department? I don't know, but it is an issue that seems to be a companion to administrative procedure 4-31. B. Also, I think it falls within at least the spirit if not the letter of the *Highways* case and Judge Bayless' decision in that the decision states, specifically, expansion of independent contractor personal service contracts has a direct and adverse effect upon the state civil service system by reducing the number of positions available to state employees. In my view, would this particular procedure not accomplish that, or be violative of that prohibition that was outlined by Judge Bayless? Those are all the comments I have unless there are questions.

Senator Grossman said the constitutional provision on which the department relied for its interpretation of the "rule of 3" basically says that the person to be appointed to any position in the state personnel system shall be one of the three persons raking highest, as determined from competitive tests of competence, subject to limitations set forth in the rules of the state personnel board, applicable to multiple appointments from any such list. The department's position is they can interpret the constitution to allow them to do what they've done, which is to expand that list. Judge Bayless appears to agree with them in his opinion. What's your position on that? Mr. Djokic said his position is that, as correctly outlined, he thinks if the board is providing guidance to date, which doesn't mean they may not in the future based on their constitutional mandate, but as it stands today, if they had not provided guidance, I think an administrative procedure could be enacted to do so, provided it does not violate the constitution or the enabling statute underneath. I think as staff has indicated, and on the mere facts of the two matters before the personnel board from the department of labor and employment, based on the application of the procedure to fill multiple vacancies, you could run askew of not only the constitution and the "rule of 3", but also the statute as well.

Miller Hudson, Executive Director, Colorado Association of Public Employees (CAPE), testified before the Committee. He said he wants to make it clear that he is not an attorney and he is not here to debate the fine points of the law. He wants to deal with the issues raised in chapter 10 of the administrative procedures on contracting and talk about the way the real world works for state employees. While we certainly welcome the interpretation that was given here today, in the real world, neither the courts nor the personnel board have been supportive of that interpretation. The negotiations that went on around the civil service reform bill and the referendum that went to voters last year included lengthy discussions on this contracting issue. A member of our staff worked closely on developing this language. She's unfortunately out of town, but is available to the Committee in the future. I want to take a few minutes to point out to the Committee that since 1993, not a single state contract has been successfully challenged. One interpretation would be that we do such a fine job that there were no contracts worthy of such a challenge. However, the two cases we're all aware of that got to district court were both mooted because by the time they were heard, the contracts had been signed, the work was being performed, and the courts were unwilling to listen to the merits of the case. Some kind of notice provision and appeal process prior to the execution of contracts is desperately needed. I know the legislature is looking at contracting in other perspectives this year. I don't know whether any legislation to this effect would be appropriate in the bills that are

proposed, but absent that, I hope the Committee will be willing to work with the department and with the employee associations to create some kind of notice and appeals process on contracting. No one at CAPE and no one on this Committee has time to sit down and watch all the private contracting that goes on, and so there is no opportunity under the current system to get any notice ahead of time and by the time the bell does ring, it's too late.

Representative McGihon said she had a couple questions for Mr. Cartin. She said having heard the testimony regarding administrative procedure 10-3. E., have you had a chance to look at that and have some sort of conclusion? Mr. Cartin said yes, we reviewed the rule back when we reviewed the entire package. The last sentence of the rule says that a person may work as a state temporary employee six months and subsequently be retained as a contract worker by a different department. While we saw how there might be some similarity with the administrative procedure that authorizes the succession of temporary appointments, we thought the difference was the temporary employee followed by the contract is different from successive temporary employment. We couldn't say for sure whether or not we thought that particular rule conflicted with the temporary employment provision of the constitution like we did with administrative procedure 4-31. B., which has two problems: The language and successive temporary employment. We thought they were distinguishable, and we didn't think the same infirmity existed with administrative procedure 10-3. E.

Representative McGihon asked if that was because of being retained in a different capacity? Mr. Cartin said right. With the limited knowledge we have, frankly, of how things operate on the ground, that seemed, on paper, to be different to us, than one appointment to a temporary position followed by another appointment to a temporary position, as distinguished from an appointment to a temporary position followed by a contract. It seemed different. We couldn't make the same arguments, with confidence, that we made with the other rule.

Representative McGihon said by the same token, did you have a chance to look at administrative procedure 10-1.? Mr. Cartin said we did and to us, that particular procedure looked more like a legislative declaration than a rule. Again, we couldn't with certainty say that there was a conflict between the aspirational language or the informative language of administrative procedure 10-1. and one that really affirmatively did something. On those grounds, since it did seem to be more of an affirmation, rather than a substantive change or direction, we again didn't find a conflict.

Representative McGihon asked if Mr. Cartin had a chance to look at administrative procedure 4-14. as well? Mr. Cartin said yes, we did. In our mind, this was a close call because it talks about assessments, rather than competitive examinations. In our conversations with representatives from the department, it seemed to us as though there are, in the real world, based on their representations, assessment tools that equate to competitive examinations. Section 24-50-112.5 (2) (b), C.R.S., provides that candidates receiving a final passing score at the completion of the examination process shall be placed on the eligible list and ranked. Section 24-50-112.5 (1) (b), C.R.S., says appointments and promotions to positions shall be based on job-related knowledge, skills, abilities, competencies, behaviors, and quality of performance as demonstrated by fair and open competitive examinations. Based on that statutory language, it just wasn't solid enough of an issue for us to say that the assessments this rule envisions aren't the same as the competitive examinations the constitution and statute talks about.

Representative McGihon said the rules throw in that assessment tools shall be developed, administered, and scored in compliance with professional guidelines. Do you know what those are? Mr. Cartin said when we had our conversations with the department, they did offer to us the guidelines that they utilized. I'll confess to you that we did not go through those with a fine-tooth comb.

Representative McGihon said my concern is the notion we heard in the testimony that this is maybe too much flexibility that gets away from the accurate testing we'd like to see in the civil service, which is why I was pressing you about what those professional guidelines were, because there's no definition of what profession and how those are determined. I have more concern about administrative procedure 4-14. than I do about the other rules we discussed. You're saying that's a close call as well? Mr. Cartin said in our eyes it was, yes. The language of administrative procedure 4-14. says examinations include any professionally accepted assessments of qualifications, competencies, and job fit. We couldn't say that particular passage gave the appointing authority flexibility beyond the competitive examination strictures in the constitution and statute for certain, because it looks as if that contemplates examinations. The next sentence says examinations may include, but are not limited to, etc., or any job-related assessment. Again, that appeared to be a close call on whether or not one could reasonably argue that contemplates something other than a competitive examination. It next says that assessment tools shall be developed, administered, and scored in compliance with professional guidelines and state and federal law. Based on the representations of the agency, those appear to

be part and parcel of these assessments and examinations, and it was too close of a call for us to take it to Committee, but I understand your reasoning as well.

Senator Grossman said the Committee has heard testimony on all the rules and the staff recommendations. We already took action on the rule from the personnel board, so is there a motion?

3:43 p.m.

Hearing no further discussion or testimony, Representative McGihon moved that administrative procedures 4-31. B., 10-3. F., and 10-5. of the Executive Director of the Department of Personnel be extended and asked for a no vote. The motion failed on a 0-10 vote, with Senator Dyer, Senator Groff, Senator Grossman, Senator Mitchell, Senator Veiga, Representative Carroll, Representative Hefley, Representative King, Representative Marshall, and Representative McGihon voting no.

3:44 p.m.

Hearing no further discussion or testimony, Representative McGihon moved that administrative procedure 2-11. A. of the Executive Director of the Department of Personnel be extended and asked for a no vote. The motion failed on a 2-8 vote, with Senator Mitchell and Representative Hefley voting yes and Senator Dyer, Senator Groff, Senator Grossman, Senator Veiga, Representative Carroll, Representative King, Representative Marshall, and Representative McGihon voting no.

3:45 p.m.

Hearing no further discussion or testimony, Representative McGihon moved that administrative procedure 4-24. of the Executive Director of the Department of Personnel be extended and asked for a no vote. The motion failed on a 2-8 vote, with Senator Mitchell and Representative Hefley voting yes and Senator Dyer, Senator Groff, Senator Grossman, Senator Veiga, Representative Carroll, Representative King, Representative Marshall, and Representative McGihon voting no.

3:45 p.m.

Hearing no further discussion or testimony, Representative McGihon moved that administrative procedure 4-14. of the Executive Director of the

Department of Personnel be extended and asked for a no vote. Senator Grossman said the motion is in order, but the rule was not recommended for nonextension by staff. He asked Representative McGihon to briefly explain administrative procedure 4-14. Representative McGihon said administrative procedure 4-14. is the assessment of qualification and, as she was discussing with Mr. Cartin, relates to the testing of personnel. I believe that the rule, as written, goes beyond the authority for fair and open competitive examinations and instead allows assessment tools rather than competitive examinations, which go beyond that authorized under the constitution and statute. Senator Mitchell said as a matter of clarification with Mr. Cartin, as he understands it, staff reviewed this rule and found it to be consistent with statute and constitutional provisions. A no vote on Representative McGihon's motion would be contrary to staff's recommendation. Is that correct? Mr. Cartin said staff reviewed this procedure and found it consistent with the constitution and the statute, and I guess under those circumstances, a no vote would be inconsistent with staff's findings with regard to this particular procedure. Senator Mitchell said he would a urge a yes vote to endorse staff's recommendation on this issue and the department's position. Representative Marshall asked if Representative McGihon could be a little more explicit about what her concern is with giving some latitude or flexibility in terms of developing assessment tools to be used to hire employees. I do know that in the state personnel system, and I am a former human resource analyst, there is very little black and white, especially at certain levels. When you're hiring at a director's level or administrative level, it's very difficult to have cookie cutter assessment tools, and because of maybe the broadness of the position or the need for the position to be able to respond to a variety of issues, you need to develop an assessment tool that would be appropriate. Sometimes it has to be customed to the job that you're developing the tool for and it's not always black and white. Representative McGihon said she can understand that and would agree with the department needing flexibility. My concern is the lack of definitions around the assessment tools, how far they're going to go, and whether or not they cut across economic and social classes. They could be used in a discriminatory fashion. I also have a concern about delving into things beyond the scope of the job. I would love to see the department come back with a rule that is better defined and really tells us what the competitive testing is doing and why it's there. Senator Mitchell said if the concern is appropriate factors being used to hire people, there's states civil rights law, federal civil rights law, and title 7 of the United States Code. Any problem in those areas can be addressed by existing state and federal law. When it comes to allowing state managers and state officials to hire the right people for the right job, I don't think there's a problem with the personnel system being too flexible and I'm pleased to give the department any

additional flexibility in identifying good candidates. I again urge a yes vote. Representative McGihon said she totally agrees with those laws, but we have, number one, a constitutional duty ourselves and, number two, you may not have been here when Mr. Cartin gave his testimony that this is a very close rule for the staff. They had difficulty with this rule and if there are a number of concerns about it and we do have a constitutional duty ourselves, then I would urge a no vote. The motion passed on a 9-1 vote, with Senator Dyer, Senator Groff, Senator Grossman, Senator Mitchell, Senator Veiga, Representative Carroll, Representative Hefley, Representative King, and Representative Marshall voting yes and Representative McGihon voting no.

Jason Gelender, Senior Staff Attorney, Office of Legislative Legal Services, addressed agenda item 1a - Rules of the Colorado Lottery Commission, Department of Revenue, concerning specific guidelines for Colorado lottery promotions, 1 CCR 206-1.

Mr. Gelender said before getting into the Office's specific objections to rule 12, I think it's important to understand a few preliminary things about lottery rule-making and lottery promotions and get a feel for the scope of what I'm going to be talking about today. First, it's important to understand who has the authority to promulgate lottery rules. The authority is vested in the lottery commission, not the lottery director or anybody else. The commission's rule-making authority is independent of the department of revenue by statute, in section 24-35-202 (2), C.R.S. The lottery director has authority only to recommend rules to the commission. The second preliminary point is that when we talk about lottery promotions, the lottery statutes do not define what a lottery promotion is or otherwise make more than passing reference to them. The lottery director, under statute, does have authority with the concurrence of the commission or pursuant to commission requirements and procedures to enter into contracts for promotions of the lottery. I think that in the absence of statutory guidance, we need to understand what types of games and contests the commission considers to be lottery promotions. Rule 12.2 indicates that rule 12 is intended to apply to level one and level two lottery promotions, and rule 12.1 g. and h., respectively, define "promotion level one" and "promotion level two". Without getting into too many specifics, what these definitions indicate is that with promotions or contests developed by the lottery in which prizes are awarded, the purchase of a lottery scratch or instant ticket and/or an on-line ticket may or may not be required. The prizes can include cash, merchandise, and/or services in amounts up to $599 for a level one promotion and over $599, as determined by the lottery director, for a level two promotion. This is a little bit trickier than some issues we deal with because we're talking about both rule 12, which is what we're actually challenging, but

we're also talking about lottery drawing guidelines, which are sort of the basis of our main argument as to why we don't believe portions of rule 12 should be extended. As far as lottery drawing guidelines, lottery statutes don't define or reference them at all. Rule 12.1 c. does, however. It indicates that the drawing guidelines: (1) Are approved by the lottery Director; and (2) are intended to govern the conduct of drawings for level one and level two lottery promotions. To briefly summarize our arguments, we have three major objections to portions of rule 12. The first is the main argument, and the most complicated one. We believe that certain subparts of rule 12 improperly allow the commission to address certain types of substantive and procedural parameters for lottery drawings that are required by applicable statutes to be addressed by rules. Instead, the rule allows them to be done through drawing guidelines and the drawing guidelines are approved by the lottery director, rather than through rules promulgated by the commission. Our second argument is an incorporation by reference argument, which says that two subparts of rule 12 improperly attempt to incorporate the drawing guidelines by reference. The last argument comes out of what we believe to be a direct statutory conflict with a couple of the provisions of rule 12.

Mr. Gelender said that for the first argument, in a nutshell, what we're arguing is that the commission's drawing guidelines are, in substance, rules but that they were not promulgated as rules by the commission in accordance with the requirements of the APA and, therefore, are invalid. As a consequence of that, we feel that, to the extent that some parts of rule 12 allow use of the drawing guidelines, those rules are also invalid because they allow matters that both general and specific statutes require to be addressed by rules and instead be addressed in the drawing guidelines. The first argument goes to rule-making generally and what a rule is. Essentially, we have two points that the Committee is probably quite familiar with. First, that an agency promulgating a rule needs to have the authority to do it. Secondly, they need to comply with specified procedural requirements when doing it, which include the typical notice of approved rule-making, holding a public hearing, submission of the rule to the attorney general for a determination of constitutionality and legality, and publication of the final rule adopted in the code of Colorado regulations. Absent compliance with these requirements, a rule is invalid. The purpose of these requirements is essentially to ensure that interested parties can have a say regarding proposed rules that will effect them during the rule-making process and that after the enactment of a rule, the public knows that the rules say and can determine their effect.

Mr. Gelender said that rule 12.1 c. defines the term "drawing guidelines". I have three points to make about this definition. One, they govern the conduct

of level one and level two promotions. Two, they're approved by the lottery director and they are not promulgated as rules by the commission in accordance with APA requirements. Three, they therefore are invalid if they address matters that must be addressed by rules. The key question is whether the drawing guidelines do in fact do that. It's our position that they do and there's conflict both with the general statutes that govern rule-making and specific statutory conflicts as well. Section 24-4-102 (1.5), C.R.S., is the general definition of "rule" that applies for purposes of the APA. It states a rule includes every agency statement of general applicability and future effect implementing, interpreting, or declaring law or policy or setting forth the procedure or practice requirements of any agency. Rule 12.2 indicates that the drawing guidelines can designate the number and sizes of prizes and the manner of selecting winning promotion entries. This seems to declare and implement the commission's policy regarding such matters and also to set forth procedure or practice requirements of the commission with respect to promotional lottery drawings. Due to this, the drawing guidelines look like rules in substance, if not in name. Another point on rule 12.2 that seems critical is that it states that to the extent not inconsistent with such specific rules, regulations, and/or drawing guidelines as may be adopted, the following provisions under rule 12 shall apply. In other words, rule 12 itself says that the drawing guidelines trump any provisions of the rule that conflict. A person looking at the rule alone doesn't necessarily know what provisions of the rule actually apply. It's our belief that this defeats one of the main goals of the APA, which is public knowledge of how agencies operate and how agencies' practices are likely to affect them.

Mr. Gelender said that besides the general APA statutes, specific lottery statutes indicate that the drawing guidelines are, in substance, invalid rules. Section 24-35-208, C.R.S., has provisions that indicate that rules promulgated by the commission shall include, but shall not be limited to the following. Then, it lists, among other things, the types of lotteries to be conducted, numbers and sizes of the prizes, manner of selecting the winning tickets or shares, and frequency of the drawing or selection of winning tickets or shares. Rule 12 sets forth specific procedures and practices requirements that directly conflict with the requirements of section 24-35-208 (2), C.R.S., that the commission include those procedures and requirements in rules. There are direct conflicts because rule 12 allows the commission to adopt drawing guidelines that designate some of the information the statute indicates must be designated by rule. Rules 12.9 a. and 12.9 b. directly conflict with section 24-35-208 (2) (c), C.R.S., by allowing the number, kind, and sizes of lottery promotion prizes to be set forth in drawing guidelines. Rules 12.9 b., 12.10, 12.11 a., 12.11 b., 12.11 c., and 12.11 d. allow lottery promotion prizewinners

to be determined in accordance with drawing guidelines. There may be an argument by the commission that the guidelines are merely interpretive. However, because: (1) They address all these matters that are required to be addressed in rules and are clearly the content of what the statute contemplates should be in rules; and (2) The drawing guidelines can actually trump conflicting provisions of the rule, they clearly seem not to be merely interpretative rules or general statements of policy that can be done through something other than a rule. Accordingly, we believe that the drawing guidelines are invalid because they were not promulgated as rules by the commission in accordance with the public notice, public hearing, publication, and other requirements of section 24-4-103, C.R.S., that agencies must follow when promulgating rules. Because the rules themselves reference the drawing guidelines or allow things to be done by the drawing guidelines, those rules should not be extended. Specifically, we feel that rules 12.1 c., 12.2, 12.3, 12.4 a., 12.4 b., 12.4 f., 12.6 a., 12.7, 12.9 a., 12.9 b., 12.10, 12.11 a., 12.11 b., 12.11 c., and 12.11 d. all either refer to or attempt to incorporate by reference the drawing guidelines and should not be extended.

Mr. Gelender said the second argument is an incorporation by reference argument. Essentially, rules 12.4 a. and 12.7 improperly attempt to incorporate the drawing guidelines by reference. Section 24-4-103 (12.5) (a), C.R.S., specifies the types of materials that may be incorporated into rules by reference. Those include federal rules, codes, or standards or published codes, standards, or guidelines of any nationally recognized scientific or technical association. They do not include drawing guidelines or other documents produced by a state agency. Since rules 12.4 a. and 12.7 attempt to incorporate those drawing guidelines by reference and those are materials of a type that cannot be incorporated by reference under the statute, the rules should not be extended.

Mr. Gelender said our last argument has to do with lottery drawing teams and witnessing by certified public accountants. Rules 12.11 e. and 12.11 f. improperly allow lottery promotional drawings to be conducted without adherence to certain procedures required by section 24-35-208 (2) (d), C.R.S., and therefore directly conflict with that statute. Specifically, the statute says: (1) All lottery drawings must be held in public; (2) Neither an employee of the lottery nor member of the commission may perform a drawing; (3) An independent certified public accountant must witness all drawings; and (4) An independent certified public accountant must examine all drawing equipment used in the public drawings. The rules both directly conflict with the statute because they allow drawing teams, that include lottery employees, to conduct promotion drawings. Rule 12.11 e. further conflicts with the statute by

eliminating the requirement that certified public accountants witness drawings and perform equipment inspections for level one promotions. Because rules 12.11 e. and 12.11 f. directly conflict with section 24-35-208 (2) (d), C.R.S., those rules should not be extended.

Michael Cooke, Executive Director, Department of Revenue, testified before the Committee. She said, in case the Committee has questions she can't answer, here with her is the director of the Colorado lottery, Peggy Gordon; the deputy director, Tom Kitts; and Maurie Knaizer from the attorney general's office. I appreciate an opportunity to address the Committee on this issue. We respectfully disagree with staff's recommendation, in part, perhaps not entirely. We had an opportunity to meet with staff some months ago on this issue when it was first raised. At that point in time we came to an agreement that all of rule 12 should be repealed. The department did agree with that assessment. Somewhere between the point of our meeting and the posting of your agenda for the December 15 meeting, where we were continued to this date, staff opinion had changed in part. Due to the holidays and various things, we were unable to coordinate another meeting about what had changed. Where we agree with staff is on the repeal of the rule. What we are dealing with here is the difference between a promotional drawing and a lottery. I think where the disagreement exists is in staff's suggestions that these rules should be repromulgated, or that we need rules to conduct a promotional event for the Colorado lottery. We have been, for the 23 years of the lottery, conducting promotional drawings, so this is certainly not a new procedure. We use drawings to market the lottery, and our 2,800 retailers across the state use promotional drawings to get people into their retail outlets to promote their own stores and retail locations. The commission adopted rules around promotional drawings many years ago and from what we understand from those that were present at the time, it was really done to ensure that the procedures were clear, not necessarily because the commission felt they had an obligation to adopt rules, but that they could adopt rules just for procedural purposes. We have retailers statewide that really benefit from these promotional drawings that bring customers into their stores. An example would be the Conoco stores. Across the state during the winter months in the past couple of years we've partnered with them. Each week at a Conoco station somewhere in the state they're doing a promotional drawing. They might bring a sports figure into the store or do a drawing for T-shirts or key chains. I think the extent of expenditures for those drawings is about $271 for 10 drawings across the state at different Conoco stores. It's really just something the stores want to do to promote new establishments or existing establishments. Some of the promotional drawings do utilize used scratch tickets as an entry mechanism for the drawings, but those tickets have

no value. That value has been used once those tickets are purchased for a dollar, or whatever the cost of a ticket might be, and scratched and either a prize is claimed or it's a losing ticket. It has no value any longer. However, we will in some cases, not all cases, use those tickets as an entry mechanism for the drawing. It might be interesting to note that section 24-35-208 (2) (b), C.R.S. states that no ticket or share in any instant lottery shall be less than a dollar. For the promotional drawings we're talking about, there is no cost for those tickets, so I think there is definitely a difference between a lottery and a promotional drawing, beginning with that provision of statute alone. The maximum value of prizes awarded through our promotional drawings statewide is $599, but it's typically jackets, T-shirts, tickets to sporting events, or 10 gallons of gas at a gas station. In the 2004 legislative session, we saw a bill introduced by the state auditor's office, Senate Bill 204. In that bill, the commission's powers and duties were changed from a type 1 agency to a type 2 agency under state statute. What was last as a power for the commission and what was highlighted in the testimony as their primary function was to promulgate rules related to the lottery, but not related to operational matters. "Lottery" is defined in section 24-35-201, C.R.S., as any and all lotteries where prizes are awarded on the basis of designated numbers conforming to numbers selected at random. We don't use numbers in promotional drawings; it's just a drawing out of a drum or hat. A drawing like that is not, in our opinion, required to be addressed in rules because the commission's rule-making authority is specific to lotteries and lotteries has to do with designated numbers conforming to the random selection of numbers. In 2004, at the request of the state auditor's office, the Office of Legislative Legal Services issued an opinion on June 28, 2004, that states, in part, the provisions of section 24-35-209 (2) (d), C.R.S., do not appear to apply to promotional drawings for prizes of low dollar or so-called third-tier drawings. The state auditor's office was asking Legal Services directly whether or not our promotional drawings should be subject to the APA, witness, etc. Legal Services' opinion at that time was no, these are promotional drawings and are not subject to the provisions of section 24-35-209 (2) (d), C.R.S. That particular opinion became part of the state auditor's office findings in the financial audit of the Colorado lottery on June 30, 2004, and it is stated in that audit. I'd also point the Committee to section 12-9-102.5, C.R.S., which is in the bingo and raffles law, which is not part of the Colorado lottery statutes but may be relevant. That particular section states, in part, that prize promotions involving the conduct of free product giveaways through the use of free chances for purposes of commercial advertisement, the creation of goodwill, the promotion of new products or services, or the collection of names should not be subject to regulation. It goes on to say that no award of prizes by chance for a purpose set forth in subsection (1) of this section shall be deemed

a lottery or game of chance. At least relative to bingo and raffle, it was determined that those promotional opportunities were not part of the games. We would argue that the same is true here. I think the real effect of this, if we were to determine that our promotional and marketing opportunities were really lotteries, would be to bring into question promotional opportunities held by any business in this state. We see the Cadillac in the center of Cherry Creek Mall, where you drop your name into the bucket for a drawing for the car, we see radio station giveaways all the time, the business cards in the fish bowls for lunches, and if those are to be considered lotteries and are not under the Colorado lottery, we would have to consider that illegal gambling in this state. We've got 2,800 retailers that would be impacted by this decision, unable to do the little promotional T-shirt giveaways and that type of thing. We, as an organization, and operating as an enterprise in this state, much like a business, would have our hands tied on marketing opportunities. We would be unable to continue to do the things we do where we go to a Mammoth game and perhaps give away a prize or partnering with KOA radio station to give away some prizes to promote the Colorado lottery. We would argue that marketing efforts and promotional drawings are very different from lotteries and it is lotteries the commission governs by statute and that we should be able to continue marketing efforts through administrative procedures. If a rule needs to be promulgated for every promotional drawing held at one of the retail locations, it would be impossible. The net effect will be that we will need to cease and have our retailers throughout the state be told that they could no longer do these types of drawings. But again, what does that mean to all businesses in Colorado who conduct these drawings on a regular basis?

Senator Grossman said Ms. Cooke is not contesting the nonextension of the rest of the rules set forth in the Office memo, other than rules 12.11 e. and 12.11 f. Is that correct? Ms. Cooke said we agree to the repeal of all of rule 12 and that's what we had previously agreed to with staff. Our issue is that we don't believe it should come back or that the commission has a role in designating, by rules, marketing strategies that we use in the Colorado lottery.

Senator Grossman asked where is it in the statutes that gives the commission authority to hold these promotional drawings? Ms. Cooke said it's not in statute giving the commission authority. The Colorado lottery has had a marketing program in place that utilizes many methods for all 23 years of the lottery. Marketing is the key to the Colorado lottery. Without our marketing and promotional opportunities, there would likely not be a Colorado lottery. We utilize contractor services in order to do the advertisements you hear on radio and TV, but the promotional drawings are a piece of that.

Senator Grossman said it seems to him that you should probably get the same kind of statutory language that you referenced with regard to raffles and bingo to clarify this. It just seems to me, looking at what staff put together and what you're saying, that there is no legislative authority whatsoever for you to do anything other than lotteries and what you're saying is that these drawings are just part of marketing collateral. It puts us in a pickle because a lottery is a lottery by the definition and you had a very good point that if that's the case and you interpret it that way, then all these private things would have to be considered lotteries. I'm not sure I agree with that, but at least with regards to what you do, I think the interpretation is correct. You don't have any authority to do anything other than a lottery that I see.

Mr. Gelender said he has a few responses. He said he would concede that he has communicated poorly on this issue. Esther van Mourik found this issue and we met with the department and tentatively, from looking at section 24-35-201, C.R.S., agreed with Ms. Cooke's reading of that statute that these are not lotteries. Subsequently, as we started to look at it and work on it more, I changed my mind on that. While I did speak to Maury Knaizer, I did not communicate directly with Ms. Cooke and did not follow up as well as I should have. To that extent, I concede fault. Going to the merits of the issue, which is more important, the first thing I want to address is that definition of "lottery" in section 24-35-201 (5), C.R.S. It states that lottery means any and all lotteries created and operated pursuant to this part 2, including, without limitation, the game commonly known as lotto, in which prizes are awarded on the basis of designated numbers conforming to numbers selected at random, electronically or otherwise, by or at the direction of the commission. What I was convinced of at that initial meeting was Ms. Cooke's interpretation, which is that the prizes awarded on the basis of designated numbers conforming to numbers selected at random went back to all lotteries. Having looked at it subsequently and having thought it through more, I believe that language only qualifies the phrase "the game commonly known as lotto", the main lottery. I would point out there are old rules, some may still be in the code of Colorado Regulations that govern certain promotional drawings. For example, commission rule 12 c., which governs the Colorado lottery cash five doubler promotion, indicates that the statutory basis for the rule is sections 24-35-208 (1) (a) and (2) and 24-36-212, C.R.S. Section 24-35-208 (1) (a) gives the commission authority to promulgate rules governing the establishment and operation of the lotteries it deems necessary to carry out the purposes of that part 2. At least in the past, if not now, it appears these promotional drawings have been viewed as lotteries. The second point I have goes to the legal opinion Ms. Cooke referenced.

Senator Mitchell interrupted to ask if it's the case we're going back and forth over rules the department has agreed to accept the withdrawal of and the only question is the department's desire for some assurance that it won't somehow bounce back to the commission? Is the department's desire even within the jurisdiction of this Committee to grant? Senator Grossman said it's his understanding Ms. Cooke does not want to repromulgate any rules governing the marketing activity that staff is describing as a lottery, but Ms. Cooke is describing as a promotional activity that should not be regulated. While, yes, the department has agreed to withdraw its opposition to not extending the rules, I think a very significant matter of concern to this Committee is whether or not those rules need to be repromulgated as far as the promotional drawings or lotteries are concerned. Did I state that correctly? Ms. Cooke said yes.

Senator Mitchell said it may be a matter of great concern to this Committee and within the purview of this Committee's authority if that attempt is made, but at this point, isn't it something like an advisory opinion or hypothetical issue for us to say you can or can't take a crack at something? If rules are promulgated, we'll review their consistency with statute. Is that correct? Senator Grossman said he believed that's correct.

Mr. Gelender said what he thinks the Office feels is that in protecting the prerogative of the legislature, which is the business we're in, the concern isn't that if they repromulgate rules that we won't see them again. The concern is that if they do drawing guidelines and don't repromulgate rules, then no one will ever see them again. The discussion we're having is whether that's something the Committee wants to hear about now or not, I suppose.

Senator Mitchell said alarmed or not alarmed, is there a motion we could pass that would have any control over that matter of concern? Mr. Gelender said he would need to defer to Debbie Haskins on that issue.

Ms. Haskins said given the history of this Committee on how this Committee has approached the issue of agencies doing things without statutory authority and doing things without going through the APA, you all make a finding that the rule should not be extended on the basis that they don't have the statutory authority to do this and that they shouldn't be doing drawing guidelines without going through the APA process. Then I think that sends a message to the department that they do need to either get a statute to authorize the promotions in the way they want to do it, or revise the rules and put the things in the drawing guidelines into rules using the APA process. I think you can send a message to the department and commission that they need to respond to.

Senator Grossman said in the interest of time, we should move forward on the issue on a motion we can make, which is to not extend the rules. I think Ms. Cooke has heard the concerns of the Committee, at least from Senator Mitchell and myself, about how to go forward here. It would be, and I don't mean to speak on behalf of everybody on the Committee, but I can speak on behalf of its current Chair, that should you decide to go forward with these promotional opportunities, you seek some kind of legislative solution to this along the same lines as what was done for raffles and bingo and that is a clarification that they are to be considered, with appropriate parameters, promotional activities not subject to the regulatory requirements of the lottery. That would be my preference, but I can't speak for everyone of the Committee. If you were to come back with drawing guidelines that simply reinstituted the program without legislative guidance, I think we'd find ourselves right back where we are today.

4:29 p.m.

Hearing no further discussion or testimony, Representative McGihon moved that rules 12.1 c., 12.2, 12.3, 12.4 a., 12.4 b., 12.4 f., 12.6 a., 12.7, 12.9 a., 12.9 b., 12.10, 12.11 a., 12.11 b., 12.11 d., 12.11 e. and 12.11 f. of the Colorado Lottery Commission be extended and asked for a no vote. The motion failed on a 0-10 vote, with Senator Dyer, Senator Groff, Senator Grossman, Senator Mitchell, Senator Veiga, Representative Carroll, Representative Hefley, Representative King, Representative Marshall, and Representative McGihon voting no.

Julie Pelegrin, Senior Attorney, Office of Legislative Legal Services, addressed agenda item 1c - Rules of the State Board of Education, Department of Education, concerning administration of the Exceptional Children's Educational Act, 1 CCR 301-8.

Ms. Pelegrin said it would probably be most helpful and convenient to take the rules in two pieces. First, I'll discuss rules 2220-R-2.03(2)(b)(iii) and 2220-R-2.03(2)(e)(iii). As you all know, in education in Colorado, parents have a good deal of choice as to where they would like to send their children for school and this also applies in the area of special education. A parent, working within the student's individual education plan, can choose to send his or her child to a school district outside the school district of residence, to a charter school, or to an on-line program. The statutes address all three of these situations. If a parent decides to send a child to another school district, a charter school, or an on-line program, the state money for the child and the federal money for the child follows the child to wherever that child goes, but,

as everyone is aware, the state and federal moneys are not sufficient to fully fund the costs of educating a special education child. Therefore, those extra costs, the costs on top of the federal and state funding, are referred to as "excess costs" and the statute allows for the payment of tuition to cover those excess costs, so that the on-line program, the charter school, or the school district that receives the child doesn't have to cover all of those costs and isn't surprised by those costs. What matters for our discussion today is the statute does not treat all three of those situations the same. Section 22-20-109 (5) (a) and (6), C.R.S., address the situation where a child with a disability enrolls in a district charter school or in an on-line program outside the district of residence. In either of those situations, the district of residence shall be responsible for paying to the district charter school the tuition charge or to the on-line program the tuition charge. In both instances, the district of residence "shall" be responsible for paying these excess costs tuition. Both statutes go on to say that the amount of excess costs, the tuition charge, will be determined by rules adopted by the state board. Now contrast this with section 22-20-109 (4) (a), C.R.S., where it talks about the situation where the child enrolls in another school district, other than the district of residence. In that situation, the statute provides that the district of residence shall be responsible for paying the tuition charge to the district of attendance, but the district of attendance shall not charge the district of residence tuition for the excess costs incurred in educating a child with a disability who receives educational services from the district of attendance for less than a percentage of time specified by rule of the state board. In plain English, what that means is under the statutes, the state board is to adopt a rule that says if the child receives special education services for less than "X" percentage of the day, then the district of residence does not have to pay the excess costs tuition. When the state board adopted the excess costs tuition rules, it chose to treat all three situations exactly the same. For the situation where the child is attending another school district, it said that the school district of residence need not pay tuition if the child receives services for less than 60% of the day. Sixty percent was the threshold set. Then, with rules 2220-R-2.03(2)(b)(iii) and 2220-R-2.03(2)(e)(iii), it says that tuition is owed to a charter school or to an on-line school only if a child receives services for less than 60% of the day. It's our contention that these two rules conflict with the statutes. The way you can always tell a conflict is to look at the same situation under the statute and under the rule, and if it plays out differently, there's a conflict. If you look at the situation where the child is going to a charter school and receives services for 50% of the day, under the rule the school district of residence would not have to pay any tuition. Under the statute, it says the school district of residence shall be responsible for paying tuition. The amount of the tuition is to be set by the state board, but the school district shall

be responsible for paying tuition. That's the same situation for an on-line program. Based on that, we feel there is a conflict between the rules and statutes.

Ms. Pelegrin said as a little history, last session the General Assembly passed House Bill 05-1255, which amended the statute to treat all situations exactly the same and to instruct the state board to set that minimum percentage floor, and the governor vetoed that statute. Last year, there was a concern that the statute did not treat them the same and therefore they brought the bill to get it changed to actually meet what the rule was doing. As I said, that bill was vetoed and so the statute remains the same to treat those three situations differently. Therefore, we would recommend that rules 2220-R-2.03(2)(b)(iii) and 2220-R-2.03(2)(e)(iii) not be extended because they conflict with section 22-20-109 (5) (a) and (6), C.R.S.

Representative Carroll said he's going to try to foreshadow what the opposition may say on this when they look at section 22-20-109 (5) (a), C.R.S., and the last sentence which allows the state board rule-making authority. I'm guessing they may say that this last sentence of the paragraph gives them enough flexibility to actually set a minimum floor. How do you respond to that, because that seems to be where the disagreement is? Do they have flexibility in statute to set a minimum floor for who pays excess costs? Ms. Pelegrin said she doesn't think the statute has that much flexibility, because that would be allowing the state board, by rule, to negate language in the statute. The language in the statute says "shall" be responsible for paying tuition. If the state board can set a tuition amount basically at zero by saying you don't have to pay and you are not responsible for paying tuition under this particular percentage floor, then that renders a portion of the statute meaningless. Generally speaking, a court would not interpret a statute that way.

Representative Carroll said to clarify what Ms. Pelegrin just said, the controlling part of the statute is the "shall be responsible for paying the excess costs" and the rule-making responsibility given to the state board doesn't allow for them to set a minimum ceiling, it just allows them the flexibility to say you can pay $5,000, $10,000, or $15,000, for example, but it doesn't give them the flexibility in relation to the rest of the statute to say you don't have to pay anything. Ms. Pelegrin said that's our interpretation.

Representative King said the compromise that was reached on these three sections was crafted when I was carrying the school finance act, so I'm very familiar with the legislative intent on this particular issue. Specifically what

I want to talk about is in subsections (5)(a) and (6), where it talks about on-line and charter schools. Specifically, in subsection (4) (a), if districts want to do a gentleman's agreement and not charge each other for a certain amount, we gave them the language to be able to do that in that particular statute. We made it different for on-line and charter schools primarily because of the locations of where some of the students come from to go to charter schools and on-line schools. We said that there would always be some payment. The state board could determine the threshold. Technically, for the state board rules to be effective under subsections (5) (a) and (6), they had to charge something for the costs of the special education to conform to the rules. In other words, they had to promulgate different rules for the difference between subsections (4) (a), (5) (a), and (6) for them to conform to the legislative intent. Ms. Pelegrin said that would be our interpretation. I can't speak to legislative intent, but given what I think is pretty clear language in subsections (4) (a), (5) (a), and (6), they are three different situations that are treated differently. On-line and charter schools are the same but those are both treated differently than agreements between school districts.

Ms. Pelegrin said she'd move on to rules 2220-R-7.03 (2) and 2220-R-7.03 (4). When the general assembly amended section 22-20-109, C.R.S., as Representative King mentioned, in adding the provisions for on-line schools and charter schools, they also instructed the state board to adopt rules on a variety of issues pertaining to special education services provided by charters and through on-line programs. In section 22-20-109 (7), C.R.S., there's a long list of issues that are required to be addressed in rules, and paragraphs (f) and (g) of that subsection the state board did not address. The state board adopted the rules to address all of the issues that were required in section 22-20-109 (7), C.R.S., but left out paragraphs (f) and (g). Therefore, because they failed to comply completely with the requirements of statute, we recommend that the rules not be extended.

Evie Hudak of the State Board of Education, representing the 2nd Congressional District, Randy DeHoff of the State Board of Education, representing the 6th Congressional District, and Byron Pendley of the Department of Education, testified before the Committee together. Mr. Pendley distributed an opinion to the Committee he said the state board received when going through the rule-making process from the attorney general's office. It is on that basis that the state board relied, which supports the state board's authority to adopt rules 2220-R-2.03 (2)(b)(iii) and 2220-R-2.03 (2)(e)(iii), and which concludes that those rules are not in conflict with state statute. As has been discussed here, the last portions of section 22-20-109 (5) (a) and (6), C.R.S., provides that in accordance with

subsection (7), it's the requirement of the board to define the types and amounts of allowable costs that a charter school or on-line program may charge as tuition for the district of residence. While we do recognize that there are differences in the language in subsections (5) (a), (6), and (7), it is our position that the distinction that is made in subsection (7) that sets a mandatory percentage of time reference that the state board must adopt as a rule, does not preclude or eliminate in any way the discretion the state board has also to adopt that similar methodology under subsections (5) (a) and (6) that provides the state board that authority. The differences exist in statute and, in fact, the discretion is provided to the state board to put into rule and use the percentage of time component as it sees fit. In fact, it was on that basis and on the basis of the attorney general's opinion that the board attempted to provide equity in the treatment of all schools when it adopted the rules establishing that percentage of time limitation as applying to traditional schools, charter schools, and on-line schools. Secondly, we disagree with staff's characterization that House Bill 1255 from last year was, in fact, an attempt to provide statutory basis that we somehow thought was lacking. In fact, we did not believe that statutory basis was lacking, and instead would recognize that both legislative and state board political compositions may change and that sometimes it's better to put things in statute for a more permanent nature than necessarily in rule. During our rule-making process approximately one year ago, the governor expressed his dissatisfaction with the proposed rule on a policy basis and in his veto message of that bill similarly expressed disagreement with the underlying policy. Nowhere in those discussions was there a discussion or argument advanced that the state board lacked the authority to adopt those rules as it did. As such, we respectfully disagree with staff's recommendation and instead request the Committee's approval of our rules.

Mr. Pendley said the second part of the recommendation deals with rules 2220-R-7.03 (2) and (4), which contain broader rate setting requirements for the board to adopt in rules. We agree with staff's finding that our rules fell short of the statutory requirement, and, in fact, had we pursued and enacted rules in compliance with statute, that would have put those rules in conflict with other sections of the exceptional children's act (ECA) and of the federal "Individuals with Disabilities Education Act" (IDEA) and as such, the state board did not adopt rules to implement paragraphs (f) and (g) in section 22-20-109 (7), C.R.S. While we agree with staff's assessment of our failing, it seems to us a disconnect to disallow all the good rules that were adopted in exchange for correcting bad statute. Alternatively, we are working and would suggest a legislative change this year as part of a proposal to align ECA and IDEA to eliminate that section of statute and thereby eliminate the conflict

between the rule and the statute and similarly would disagree with the recommendation to not extend rules 2220-R-7.03 (2) and (4), which, in fact, are valuable components of the rule.

Representative Carroll said generally, I think we all appreciate the hard work the attorney general's office puts into writing legal opinions. My concern is, and my question for you is, on page 2 of the opinion, the first sentence says section 22-20-109 (5) (a), C.R.S., provides for payment of excess tuition charges. The word "provides" is somewhat problematic for me because it implies it's an optional thing, whereas the statute actually says "shall". It also appears to me that the attorney general's office never really addressed the "shall" section of section 22-20-109 (5) (a), C.R.S., when they interpreted the part related to the promulgation of rules. When you put those two together, there's still a conflict. How do you, in your interpretation of this, see that the state board has the authority to promulgate this type of rule when there's clearly this requirement to pay excess costs, when the rule that says you can get away with not paying excess costs if you hit a certain percentage or you don't make that certain percentage? Mr. Pendley said our disagreement would be on the emphasis on the "shall be responsible for paying" through that discretion provided to the state board in the last sentence of that paragraph. In fact, the amount as determined that should be paid is zero in certain instances and in other instances it may be $5,000, $10,000, or $15,000, depending on the child and the services being provided. The requirement to pay tuition is there, and, in fact, in certain instances it may be $20,000 and in other instances it may be zero.

Representative Carroll said he thinks we'll have to disagree with that because when I see the word "shall", it just seems to imply to me that there's no instance where you can get away with not paying excess costs . The interpretation I see seems to indicate that the rule-making has to take into account that there has to be some minimum payment, not an absence of payment.

Senator Mitchell said with Representative Carroll's point, if the discretion you see in the latter part of the statute really could control the mandate at the beginning of the statute, there's no reason the state board should stop at putting the line at 60%. It could make it 80%, 90%, 95%, or 99% and have all but the most absolute circumstances not call for the payment of higher cost tuition when, in fact, the statute says "shall" pay. I appreciate Representative Carroll's logic and I think it's stronger than the response I hear coming from your side. In any event, the only other thing I wanted to bring up was you have used a familiar shorthand and Representative Carroll used it with you in

referring to this official-looking document as an attorney general opinion, but there are attorney general opinions and then there are attorney general opinions and I just want to make sure in context we understand what we're reading here. The memorandum states that this memorandum contains the legal opinion of the authoring attorney and is not to be construed as a formal opinion of the attorney general. Just so everyone is clear on the context, what we have here is the staff attorney assigned to work hand-in-hand with the state board saying yes, looks like you can do it, which is a different matter entirely from a formal attorney general opinion.

Ms. Hudak said in response to Representative Carroll's question, I want to point out that there will probably be some other witnesses who have information. If the amount of the excess costs is zero and you say you "shall" pay it, then what are you asking us to do? We're paying zero. I think, to a certain extent, the Committee needs to understand the difference in the levels of disabilities, the costs, and whether there are excess costs for those different levels of disabilities compared with how much money comes from the federal and state governments in the payments. That's why I think some later witnesses will be able to explain that to you more clearly.

Senator Grossman asked if Ms. Hudak really thinks that the legislature, in enacting the language that it did, as Ms. Pelegrin pointed out, with regards to these two excess costs issues, intended nothing different than what we did with out-of-district placement? In other words, that the 60% we put in, or whatever it was in the out-of-district placement, should apply even though we forgot to put it in the statute? Is that the position? Ms. Hudak said yes, we believe you left it to us and the department, which contains experts in the area of special ed, the costs, the excess costs, and how they are different. We didn't pick 60% arbitrarily. There were reasons that 60% was picked and that's what future witnesses, I think, could have to say, and we have some staff members here who could explain it as well.

Representative Carroll said he thoroughly appreciates Ms. Hudak's point. Although the legislature can be rather schizophrenic at times, I don't necessarily think that in two different places of statute dealing with the same issue, somehow we failed to be consistent if we meant to be, if that is the case. It just appears to me that we wrote what we wrote and meant what we wrote. One of the first rules of statutory interpretation is to deal with the statute on its face and on its face, it appears clear that we meant two different things. Under the second point that you made, I feel compelled to respond to it. You mentioned that if excess costs were zero, there would be nothing to pay. That makes our point exactly. If there's no excess costs, of course this rule

wouldn't apply, it wouldn't mean anything, and there's no excess cost to be had anywhere. I still think we're at a point where we're just going to disagree over how the statute should be interpreted and I'm actually okay with that.

Representative King said the reason why the statutes are written differently is because if you have a gentleman's agreement between districts that have kids going back and forward, it's very difficult to track the kids and bill districts from one district to another when another district is sending kids back. That's why subsection (4) (a) is written the way it's written. The reason why we wrote subsections (5) (a) and (6) differently is because a reciprocal agreement doesn't exist typically between on-line schools from one district where an on-line program could exist and another district. There's no reciprocation. That's why we made the threshold different and said there shall be a charge. I question your concept, from everything I've ever heard about special education, that there is never an individualized education program (IEP) that exists that costs nothing. If that's the case, then maybe we need to readdress what we've done with categoricals and everything I've heard ever since I've been in this legislative body that an IEP costs nothing. That's basically what you've said. It seems to me like no matter what case exists, even if a child is on an IEP 10 hours out of 1,000 hours of the required work, there is a cost associated with excess costs. Even if it's staffing, there is some cost associated with it, and that's why we have categorical funding and that's why we have federal dollars for funding. The inappropriateness of this is exactly as Representative Carroll talks about. There is an excess cost. Those excess costs shall be determined and billed at some fair percentage. Maybe you could have said in your rule that something under 10% will be billed at $50. I don't know what you would have determined. You could have said between 10% and 60% would be billed at some other dollar amount and above 60% will be billed at actual costs. That was the intent when we were making this legislative change and adding this to the school finance act the year we did it that. There's no reciprocation available typically and there are excess costs associated with kids, and that's why we charge.

Ms. Hudak said she thinks perhaps there is a disagreement in what we mean by excess costs. The categoricals are there to pay the costs of special ed above the regular costs of a regular, non-special needs student, but these are the costs above the level at which there is even categorical funding. These are the additional expenses above. Districts get categorical funds to cover the special ed costs. However, for highly disabled kids, it's not enough money. That was the presentation Ms. Pelegrin made at the very beginning. For the costs that exceed how much the districts are getting with per pupil funding as well as the categoricals, those costs are the ones that are in question. It's my belief that

for mildly disabled kids, the categorical funding is adequate, but it's for the profoundly or severely disabled kids that the funding isn't adequate. That's why there's the question of who is going to pay for it.

Mr. DeHoff said when we first started looking at these rules, I believe in one of the first proposals that went out to the public, we did treat the three programs differently. We, of course, heard an uproar from the districts that charter schools were treated different from other schools. We didn't hear much from the charter schools in opposition to being treated with the same 60% rule. As I talked to people and tried to figure out what we were really trying to solve here, it became apparent that the issue was the on-line programs, because the way special ed services are defined, it's very difficult for an on-line program to ever hit that 60% threshold. Even though the costs may be there, they don't meet the definition of services. The next question to our attorney was is there a way we can treat these programs the same within the statute, or do we have to treat them differently? At the same time, the question went to the legislature to clarify what you meant in House Bill 1255. Lawyers can argue the legal implications of the language back and forth. We were trying to do something that met, as closely as we could, the letter of the statute, and what we could derive, from our position, as the intent of the statute. We all know when you ask the legislature what the intent of the statute was, the answer you get frequently may depend on whether they supported it or opposed it. Representative Merrifield told us what the intent of the charter school institute statute was. It wasn't what I thought the intent was. We tried to satisfy the input we were getting. We asked if there was a way we could do this and at the same time we asked for legislative clarification. Among members of the state board, it was a unanimous vote on the rules. We thought we were doing what we'd been asked to do and if, in the judgment of the Committee, it turns our we didn't, we'd ask you for some more clarification, but something that would not put us in that position, without having a good justification, of treating the programs differently in ways that create an incentive for districts to discourage students with IEPs from going to a charter school because they're going to be stuck with more costs than if they go somewhere else.

Senator Grossman said he understands there is significant policy underlying this discussion, but this Committee is charged with the sole issue as to whether or not what you did was within the statutory authority granted by the legislature.

Representative King asked Mr. DeHoff if he would say that there is never an occasion, if a student has less than 60% of their time spent on an IEP, that

there will never be excess costs? Mr. DeHoff said no.

Representative King said he thinks that's the issue. The issue is we said that the tuition charge shall be determined and shall be done. What you did was chose a threshold so high that there are many occasions that there can be excess costs under the 60% and you're not following through with what the statute said for you to accomplish with the way the statute was written.

Mary Sires, Executive Director of Student Services for the St. Vrain Valley school district out of Longmont and Member of the Statewide Consortium of Special Education Directors, testified before the Committee. She said if we could get our legislators at the state and federal level to fully fund an extremely underfunded federal and state mandate, we could all go home early and not spend hours, weeks, months, and years debating who pays the money that we don't have. My job is to give you a little bit of history of this whole business of special education and excess costs. We do find that districts may learn that they have a student that they are simply unable to program for, a student with such unique needs, that we need to go to our fellow colleagues down the road. That even happens to a district the size of St. Vrain at 22,000 students. We can run into a child that is difficult for us to program, so we go to our neighbor and we talk to them about them programming and us supporting that programming with the excess costs payment. Since the creation of excess costs, I truly believe we've offered much more of a choice option to our parents, whether they go to a local district school, a charter, or an on-line. When we enroll a student in St. Vrain's, the last thing we're thinking about is how much money can I charge for excess costs. What we're thinking about is enrolling the student and applying for the revenue, which is the state PPOR, the ECA, and federal dollars. That's the money that we figure we are going to educate the student on. The revenue follows the student and, for the most part, for the vast majority of our students, that money does take care of the cost of doing business. There are, however, those students where it doesn't and that percentage is quite small. In the 2004 legislative session, in the school finance act, we had a compromise between Representatives Hefley and King that we would work on this. It would go to the state board and a committee of experts would be brought together to make a recommendation. That committee of experts was comprised of local district personnel, charters, on-lines, and the department. I was a member of that committee. We did meet and the department came forth with a proposal, but not one we all felt we could live with, because we didn't feel it was fair and equitable among all the options. The rules the state board adopted that are before the Committee and that were developed and supported by these experts are the ones we really believe should be followed. The state board spent two

months holding a variety of hearings to allow everybody to testify so they could find what were the concerns and what were the supports. They went to legal counsel, and you've already heard about the attorney general's opinion. The school districts from across the state unilaterally supported the recommendations. Cyberschools did have some concerns. Charter schools didn't testify. The state board unanimously adopted the recommendations provided by the field of experts. Again, I said that if we were fully funded we wouldn't even be here, but we're not and, therefore, we need to deal with students that require unusual educational opportunities and moneys to provide that. The debate we have here today is that the state board isn't allowed to do what we believe they should be able to do, and that is they set rates based on experts' recommendations of that 60% threshold for the excess costs, and for the students below that 60%, zero would be that.

Senator Mitchell asked her to please again describe the voices or seats that were present at the grouping of experts. Ms. Sires said there was school district personnel such as two financial officers, special education directors such as myself, individuals from charter schools and on-line schools, and department support staff.

Senator Mitchell asked what was the approximate size of the membership? Ms. Sires said the average at a meeting would run 15-20 members.

Ms. Sires said she wanted to thank Representatives Hefley and King for getting this issue to this venue. We need to make a decision. I have been in Colorado for 17 years and this has been a continuous topic. I also want to thank the state board and the department for working with us and supporting that this all needs to be fair and equitable to all the educational entities that are providing services for these students.

Representative Hefley said the work that has been done in your committee meeting, you believe you are following the legislative intent, as it should be. Is that correct? Ms. Sires said she believes we followed the intent and that if you support the state board's recommendation, that's what we believe in. We went to get support and have it codified, not because we didn't think the state board had the authority. We did that because it's typical business in our field. The state board does have certain obligations, but yet we need to have that be firm because this is a very difficult issue in the field when we don't have enough money.

Linda Murry, Assistant Superintendent of Woodland Park School District, Special Ed Director for Ute Pass BOCES, and member of the Special Ed

Consortium, testified before the Committee. She said the chart she's handed out helps explain excess costs a little bit. It's pretty confusing and I'll admit that as a new special ed director, I couldn't figure out who I owed and who owed me and I didn't know where half of my kids were. Woodland Park is a pretty small school district. We have less than 3,000 students and we're in the Pikes Peak region, so there are multiple schools districts in that area, and trying to figure out which kids are where was pretty interesting. On the chart, PPORs are per pupil funding for all students. Every single student gets that. Then there are state and federal categorical dollars and then again, we've got our excess costs. In the first box, you've got a special education student. We're using Denver and Jefferson counties as examples. If you've got a student that resides in Denver and attends school in Denver, then Denver public schools gets PPOR for that student, receives state and federal categorical dollars, and if it is a student with more significant disabilities, pays the excess costs. The next situation is where you have a student that resides in Denver or in a district but that district feels they cannot provide those services. That happens in my district a lot because we're a pretty small district. I might have a student, for example, that has some significant hearing impairments and I don't have a program, but I want to go to another district and work out a deal. That's really how this works. Denver and JeffCo, in this particular case, would discuss who's going to receive the PPOR, state and federal categorical funds, and because it is a child in Denver, originally Denver would pay any additional costs above and beyond the dollars received. Again, that happens a fair amount for a district in my size because there are a certain population of students that I might have difficulty programming for. On the chart is a third situation where you've got parent choice and, again, that happens a lot in my area and because parents can opt to go to different districts. About 10% of my students receive special education services. Most of them have a learning disability, speech services, and those kinds of things. They move freely back and forth among districts. In that particular case, then, whatever school district they go to, in this case if it's a Denver student and they choose to go to JeffCo, then JeffCo would get the PPOR, the state and federal categorical funds, and for most of our special education students, that's enough. That covers those costs. Only for those students with more significant disabilities would we have a discussion at that point. This was confusing up until last year because different districts did it differently. One district might charge, another might not, at different rates. Last year when the rules came into effect, it was now real clear on which students we're talking about. If we accept a student and that student has a mild disability, then we're able to get the PPOR, the state and federal categorical funds, and we accept all of the special ed costs on that particular student. We only start to have conversations with districts when it reaches that particular threshold and that

threshold is a student with more significant disabilities, those deemed to need 60% or more of those services. The rules were extremely helpful in making it equitable for everybody. We're all on the same playing field and we understand which kids we are talking about. In doing this, I believe it created equity across all public school choice options so that we are all playing by the same rules. This kind of standardized the payment of excess costs. Again, I didn't have one district close to me saying I'm going to charge for this and another one not. It really established which kids we were talking about that would qualify for those excess costs. It put us all where we were speaking a common language. I think it prohibited a school district, charter school, or cyberschool from charging excess costs except for those kids with a more significant disability. If it's a child with a mild disability, we get the PPOR and the state and federal categorical funding and we agree to provide services for that student and didn't worry about charging back and forth between districts. I think it's encouraged public school choice options for all students, including those with more significant disabilities because the rules are very clear on which students we are expected to pay excess costs on, whether or not we're getting any revenue streams for them. It doesn't really deal with issues of day treatments or residential facilities. It also does not place an unfair burden on public school choice options. Those schools receive PPOR and state and federal categorical special ed money for special education students that are enrolled.

Senator Mitchell said he'll ask one brief question and it's a standing question for the witnesses who follow. I have two problems with the basic arguments I'm hearing from the witnesses thus far. One, it sounds like what was agreed was this is a short hand, we're all on similar footing, sometimes we'll be sending students, sometime we'll be receiving students, and if we all agree to a certain threshold, then you win some, you lose others, but we'll kind of be on equal footing and this seems to work for us all, that is one school district to another school district. Charter schools and on-line schools aren't on the same footing with school districts relating to each other. They're generally going to be receiving the students and providing the education and if the funding falls short, it hits them every time because they're not on the reciprocal side of that give and take. That's one problem I have with it. The other problem I have with it is I'm hearing that the effort here was just to find something that worked that we can all live with, but that still doesn't mean that it approximates what the statute calls for, which is the payment of all excess costs. I've heard that this was a negotiated measure and I've heard that it added predictability, but I haven't heard anything that ties a 60% of the day threshold to whether or not there are excess costs in educating a student. There was not a word from the previous witness and not a word from you.

You can enlighten me if you want or the subsequent witnesses can.

Ms. Murry said on the reciprocal issue, I would say that not every district sends and/or receives. For example, in our district, we have a lot of kids that go down to Colorado Springs and so probably more go to another district, but, again, that district ends up getting the funding. They might live in Teller county but go to another district and that district then gets the PPOR and the excess costs so the money follows that particular student, especially those with a mild disability. Most don't come up to my district, so it's not always reciprocal I don't think. That wasn't part of the issue. It had to do more with where the funding was going. The other piece is that in the committees, when you look at a student with a learning disability, for example, a typical student like that might receive an hour a day, maybe a period a day, of intensive reading instruction. That's going to be less than your 60%. When you start looking at students with autism and so on, then you're looking at lots and lots of related services and special classrooms and high intensity and that's where that 60% comes in. There's a real split in the kinds of students when you look at all special ed students.

Senator Mitchell said he thinks he heard her say that some students are going to drive costs that are a lot higher than other students. I didn't hear you say anything to disabuse me of my preconception that a student who needs an hour or two a day of focused attention costs more than a student who doesn't. The law says that if it costs more, then the district of residence pays that cost. Ms. Murry said most students who need an hour a day, for example, that's pretty much generally covered under the state and federal categorical funding. It's those kids who need all day long, where you're looking at a classroom that might have one teacher to three kids. You might have lots of para educator support, nursing service, and those kinds of things. That's where the threshold comes in.

Senator Grossman said he would admonish the remaining witnesses. We've heard a lot about the underlying policy, which I understand is important and it's better that we all have a good understanding of how excess costs work, but really the issue that this Committee is charged with looking at is whether or not the rules proposed by the department and state board satisfy or are within the parameters set forth by statute.

Lauren Kingsbery, Colorado Association of School Boards, testified before the Committee. She said much of what she intended to say has been said. I do want to go back to the Office memo and the statutory language that you've focused on for the last hour. I would urge that you support the state board's

conclusion and the rules that it reached, because there was a lot of deliberation that went into these rules. You heard about the extensive study and a consultation with experts and I would just urge you to consider that after they went through this process, they concluded that it was reasonable to treat charter schools, on-line schools, and school districts the same. The reason this additional sentence was added for school districts at the time the legislation was adopted was because school districts at that point in time were ready to agree to that. It was a practice that was already in place. They came to the legislature and essentially said they could live with not charging excess costs over a certain percentage. At that point in time, charter schools and on-line schools hadn't had a chance to go through the deliberative process on that issue. That was the purpose of bringing the issue before the state board and there's no prohibition in the two sections that apply to charters and on-lines prohibiting the state board from looking at that approach for charter and on-line schools. To go to the question about whether this is reasonable and is 60% the right threshold, through this deliberative process, I think it was reasonable for the state board to conclude that the reimbursement that school districts receive and the reimbursement that charters and on-line schools receive for special education services will cover the education expenses of students with mild to moderate disabilities. The school districts are not trying to avoid the responsibilities for paying excess costs. I would think it's not reasonable for the school district of residence, and we have to remember that the school district of residence is not receiving any revenue for this student, to pay when there are no legitimate excess costs. Through a very deliberative process, these rules were adopted and we urge you to extend these rules.

Troy Lange, Director of Special Education for Mountain BOCES and Member of the Consortium of Special Ed Directors, testified before the Committee. He said I think what we're really talking about is fiscal accountability in a lot of ways. Excess costs can be really confusing and we can play a lot of various games with our budgets to cover the costs. Obviously, we all know that the mandate for special ed is underfunded and it's a difficult situation. We believe that the state board acted within their legal authority provided at section 22-2-107, C.R.S., and request that you extend the rules. The established practice of billing for excess costs above the 60% threshold helps to eliminate unnecessary administrative costs and it fosters a supportive relationship between administrative units. This is especially true in rural school districts and in BOCES, where we focus on leveraging our resources and making sure that all our students have needed services. We're willing to pay excess costs. There is no question about that. In fact, we're obligated to do that, but what this rule does is set the threshold for defining what a true excess cost is. When you look at our budget, 70% of the costs for serving students with disabilities

comes from local dollars, about 14% from the state, and a little left over from the feds. When we look at that 60% threshold, then, we're really looking at our most severe kids, and that's, perhaps, in response to why 60%. We believe the simple standard of paying excess costs for students being served by special education greater than 60% of the time establishes a fiscal mechanism that achieves that end in an easy sort of way. I also think that with section 22-20-109 (5) (a), C.R.S., the legislative intent, or you wouldn't have put it in there, was that amount would be determined by rules. Just as we should pay it, what we should pay should be determined by the rules, so I ask that you extend those.

William Bethke, Attorney for Kutz and Bethke, testified before the Committee. Mr. Bethke said our firm represents parents in special education matters, we represent charter schools, and we represent virtual schools. I was asked to attend here today by Colorado Virtual Academy, although I've had other involvement with charter and virtual clients and some individual special ed clients in relation to this issue. I want to focus a little bit on the language of section 22-20-109, C.R.S., that has been discussed here today, because there's some history that I think we haven't gotten into that may be helpful to the Committee. When the charter schools act was first passed, there was no reference in its financing sections to excess costs. One of the first rounds of charter applications was by a school named Rocky Mountain Deaf School, then known as Magnet School of the Deaf. Jefferson County school district wanted to grant that charter application but declined to do so because they were afraid of incurring the excess costs for out-of-district deaf students, who were reasonably expensive students. The average cost of deaf education in this state now runs in excess of $20,000 per student. As a result, there was an amendment to the charter schools act that passed, which established section 22-20-109 (5), C.R.S., and the corresponding language in the act itself. It referred to determining the amount of the tuition charge, which is the phrase the state board is relying on here today, according to guidelines adopted by the state board and the department. The department developed these guidelines, which looks like a tax form. You fill in the costs related to a student's education or for a program that's serving a number of students, you fill in the revenues that come in anyway, including the categorical revenues, you fill in the costs that are related to the regular ed portion of the student's program and the special ed portion of the student's program. You go through this set of forms and derive a figure, which is the excess cost figure. When section 22-20-109, C.R.S., refers to the amount of the tuition charge being determined pursuant to rules, the attempt there was to take those guidelines and turn them into binding rules. That was one of the changes accomplished by this legislation. I guarantee you, if you take a student who has 50-60% or 55% of

their education in special education and put in their costs related to that education in these guidelines, you will not derive the number zero. You will derive a significantly higher number. Let's take 50% as an example and think about what 50% means. For high school students in Colorado, you require a little over 1,000 hours of education a year. Fifty percent means over 500 hours of special education services. That may be aide time at around $10 an hour or that may be the time of a speech therapist who's $40 an hour, but you're talking about significant amounts of time. Depending upon the particular student's needs, a 50% student could have excess costs of $5,000, $7,000 or $10,000. We're not talking about minor costs here, and the attempt to say that the amount of the tuition charge can be transposed with the phrase in section 22-20-109, C.R.S., that talks about receiving educational services from the district of attendance for less than a percentage of time I think is simply incorrect. I understand the desire to treat the three categories of schools equitably. That desire was expressed when this legislation was proposed, and the school districts were frustrated with the fact that the legislature adopted a different rule for charter schools and a different rule for virtual schools for reasons that have been expressed here today. I think they've attempted through the rule-making process to reverse that decision. I might also add that the committee process that's been referred to, I participated in. There were three committees, actually, and the committees that dealt with the charter school and virtual side of it in no way anticipated applying a 60% threshold or any percentage threshold to the tuition charges. That came later in the process. I think as you've heard, the virtual schools have consistently objected to that. I believe the amount of the tuition charge cannot be equated to zero when in fact if you went through those forms, it would not be zero. There was a history to what that meant and then the legislature adopted it. It meant that there would be an honest calculation of excess costs and that the excess costs that are calculated shall be paid.

5:35 p.m.

Hearing no further discussion or testimony, Representative King moved that rules 2220-R-2.03(2)(b)(iii), 2220-R-2.03(2)(e)(iii), 2220-R-7.03(2), and 2220-R-7.03(4) of the State Board of Education be extended and asked for a no vote. Representative Hefley said that after getting a little confused in the middle of testimony and having worked on this project for many, many months, the one point I want to make and the reason I will be voting no is because the statement made earlier by the first team of witnesses was that the state board tried to find equity for all parties involved. That was not what the charge was, so I wanted to clarify my comments to the witnesses that made it look like I was thinking they were right on target because that's what confused

me. It was not the state board's charge to make it equal. The motion failed on a 0-10 vote, with Senator Dyer, Senator Groff, Senator Grossman, Senator Mitchell, Senator Veiga, Representative Carroll, Representative Hefley, Representative King, Representative Marshall, and Representative McGihon voting no.

Chuck Brackney, Senior Staff Attorney for Rule Review, addressed agenda item 1d - Rules of the Director of the Division of Worker's Compensation, Department of Labor and Employment, concerning Division Independent Medical Examination, 7 CCR 1101-3.

Mr. Brackney said there is good news, as the Chair pointed out many hours ago, that this rule has gone from being contested to being uncontested. An independent medical exam allows any party involved in a case, the injured employee, the employer, the insurance company, or conceivably anyone, to request a neutral, non-biased medical opinion regarding the extent of the employee's injuries. The problem with the rule, we think, is that the division has delegated to the physician a little too much authority with regards to a certain fee having to do with that examination. Section 8-42-107.2 (5) (a), C.R.S., states that except as provided in paragraph (b) of this subsection (5), which has to do with indigent fee and isn't really relevant, the requesting party shall pay in advance the full cost of the independent medical exam to the IME, or physician, at least ten days before the appointed time for the exam. If you're requesting one of these exams, you have to pay up 10 days in advance. Notice, however, there is no provision there for any sort of enforcement, late fee, or penalty accruing to the requesting party who does not pay. In rule 11-4 (B), the first part mimics the statute by saying you have to pay 10 days in advance, but then it goes a little too far when it says that failure of the requesting party to timely submit the IME examination fee shall allow the physician to charge up to an additional $100 for the review, which the requesting party shall pay. Again, in the statute, there is no authority for this additional late fee or any sort of penalty like that. Further, the division lacks the authority to grant to the physician the discretion over who to charge the fee and even how much, up to $100, the physician can charge. The physician could theoretically charge all employee requesting parties and not charge insurance company requesting parties or vice versa. Again, it's too much discretion for the physician. As an additional point, in section 8-47-107, C.R.S., which is the general rule-making authority for the director of the division, again you'll see that there is nothing about this sort of fee anywhere listed in that section. There are some other provisions in the workers' compensation act that do allow fees or penalties. In contrast, that did not happen in section 8-42-107.2, C.R.S. We believe the statute does not

authorize the director to delegate discretion or authority to collect a fee on some requesting parties and maybe not on others and to determine what portion of the $100 those parties may pay. For that reason, rule 11-4 (B) is in conflict with the statute. Finally, we have been assured that the division is going to go back to the drawing board and take another crack at this rule and try to correct it's deficiencies.

Representative Marshall said, out of curiosity, you said the division defended this rule at one point. Where did they ever think they had the authority to give physicians authority to charge an excess fee to claimants for late payments? Mr. Brackney said he thinks they read that in their general rule-making authority, they have the authority to set fees, so why not let the doctor do a fee.

5:42 p.m.

Hearing no further discussion or testimony, Representative Marshall moved that rule 11-4 (B) of the rules of the Director of the Division of Workers' Compensation be extended and asked for a no vote. The motion failed on a 0-9 vote, with Senator Dyer, Senator Groff, Senator Grossman, Senator Veiga, Representative Carroll, Representative Hefley, Representative King, Representative Marshall, and Representative McGihon voting no.

Senator Grossman said before the Committee adjourns, they need to address agenda item 2 - Approval and Sponsorship of the Rule Review Bill.

5:43 p.m.

Representative Carroll moved to instruct staff to draft the rule review bill. The motion passed on a 9-0 vote, with Senator Dyer, Senator Groff, Senator Grossman, Senator Veiga, Representative Carroll, Representative Hefley, Representative King, Representative Marshall, and Representative McGihon voting yes.

Charley Pike, Director, Office of Legislative Legal Services, addressed agenda item 4 - Update on OLLS Budget for FY 2006-07.

Mr. Pike said the problem with the budget is the Executive Committee may meet by the latter part of this month, the 22nd or 23rd, and we'll have to present our budget to them at that point. If the Committee wants to meet again to go over the budget, we could do that, or we could have a real quick short and dirty version of the budget right now. The question is if the Committee

does not approve the Office budget, we will have to present it to the Executive Committee under the caveat that it hasn't been approved by the Committee.

Senator Grossman asked if we could schedule a meeting after session starts in the early morning? Mr. Pikes said we can try to do that. Senator Grossman said let's do that.

Senator Grossman said the Committee also received the proposed notification documents. Take a look at those so we can approve that as well.

5:45 p.m.

The Committee adjourned.